ABSTRACTERS OF TITLE

THEIR RIGHTS AND DUTIES WITH SPECIAL REFERENCE
TO THE INSPECTION OF PUBLIC RECORDS,
TOGETHER WITH A CHAPTER ON

TITLE INSURANCE

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PREFACE

The writer of this treatise has been connected with and interested in title companies in Chicago for the past twenty years. Perhaps this fact should make him hesitate to present this work, and yet it is natural that he should write on subjects in which he has been interested and with which he has been familiar for so long a time. In view of the great and increasing number of professional abstracters of title and the consequent interest in the use and inspection of public records, it is timely to publish a work in which the cases bearing on the rights and duties of abstracters, and on the right to use and inspect public records, are classified, stated and reviewed. Here is such a book. Time and use will tell whether it has added to the exposition of the law on the subjects which it treats.

There is in it some reiteration of ideas and phrases. This has seemed to be necessary in order to treat fully the topics under consideration. When a writer criticises opinions of courts for lack of clearness and analysis in discussing the issues presented in cases, it is incumbent on him to strive to avoid these defects, even at the risk of repeating himself.

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CHAPTER I.

NATURE OF THE UNDERTAKING OF AN ABSTRACTER.

§ 1. Generally. When a person engages in the business of searching the public records, making abstracts of title to real estate for the public for compensation, he does not become an indemnitor or guarantor, but the law implies that he assumes to possess the requisite knowledge and skill, and that he undertakes to use due and ordinary care in the performance of his duty. Skill as well as care is required in his undertaking, and if he fails to exercise either and injury results, he is liable in damages.[1] In undertaking to prepare an abstract of title to land, an abstracter agrees to present a summary of the records of all grants, patents, conveyances, wills, documents and all judicial proceedings which may affect the title in any way, and of all mortgages, judgments, taxes, assessments, mechanics' liens, lis pendens notices or other liens which may incumber the title. He should set forth whatever concerns the sources of title and its conditions, whether these tend to confirm the title or to impair it.[2] The contract of the abstracter is that he will ascertain and report the condition of the title as shown by the records, and the abstract and certificate which he furnishes are the evidence of the way in which he has performed his duty. He should set out every part of an instrument, which may have a bearing on

[1] Chase v. Heaney, 70 Ill. 268 (1873). Rankin v. Schaeffer, 4 Mo. App. 108 (1877). Schade v. Gehner, 133 Mo. 252; 34 S. W. Rep. 576 (1895). Brown v. Sims, 22 Ind. App. 247; 53 N. E. Rep. 779; 72 Am. St. Rep. 308 (1899).

[2] Banker v. Caldwell, 3 Minn. 94 (Gil. 46) (1859). Taylor v. Williams, 2 Colo. App. 559; 31 Pac. Rep. 504 (1892). Union Safe Dep. Co. v. Chisholm, 33 Ill. App. 647 (1889). Smith v. Taylor, 82 Cal. 533; 23 Pac. Rep. 217 (1890). Heinsen v. Lamb, 117 Ill. 549; 7 N. E. Rep. 75 (1886). Kane v. Rippey, 22 Ore. 296; 23 Pac. Rep. 180 (1892).

the condition of the title, and one who has procured an abstract is entitled to assume that any part which is not set out has no bearing.[3] He must decide for himself, according to his judgment and experience, whether any parts of an instrument should be quoted in ipsis verbis, or should be abstracted merely. He is liable for resulting loss if he fails to make all necessary searches or if he searches without due care. He is bound to know that what he certifies to is true, and it is a neglect of duty for him to certify to what is error.[4] The necessity for skill on the part of the abstracter is pointed out in one of the many definitions of an abstract of title, wherein it is said to be a paper prepared by a skilled searcher of records, which shows an abridgment of anything affecting the title and appearing on record in the public offices.[5]

§ 2. **Must have requisite knowledge.** A professional abstracter is not liable if he mistakes the law in a matter of difficulty where the law is not well settled, but if he certifies that he has made examination and finds no incumbrance against certain property, he will be liable if an incumbrance is of record in such a way as to give constructive notice to everyone interested. He is bound to know what is and what is not a lien on real estate and to use sufficient diligence to find any incumbrance properly of record. Where there may be a reasonable doubt as to whether a certain recorded instrument is a lien, and he decides that it is not, he does so at his own peril. If he does not wish to as-

[3] Burnaby v. Equitable Soc., 54 L. J. Ch. 466; 52 L. T. N. S. 350 (1885).

[4] Gilman v. Hovey, 26 Mo. 280 (1858).

[5] Smith v. Taylor, 82 Cal. 533 p. 545; 23 Pac. Rep. 217 (1890). There are many definitions of an abstract of title, and some of them are given with reference to the points at issue in the cases. See Warvelle on Abstracts, § 2. Martindale on Abstracts, § 3. 1 Bouv. L. Dict. 47. Anderson's L. Dict. 9. Roberts v. Vornholt, 126 Ind. 511; 26 N. E. Rep. 207 (1890). Hoover v. Weesner, 147 Ind. 510; 45 N. E. Rep. 650; 46 N. E. Rep. 905 (1897). Heinsen v. Lamb, 117 Ill. 549; 7 N. E. Rep. 75 (1886). Union Safe Dep. Co. v. Chisholm, 33 Ill. App. 647 (1889). Constantine v. East, 8 Ind. App. 291; 35 N. E. Rep. 844 (1893). Loring v. Oxford, 18 Texas Civ. App. 415; 45 S. W. Rep. 395 (1898). Stevenson v. Polk, 71 Iowa 278; 32 N. W. Rep. 340 (1887). Banker v. Caldwell, 3 Minn. 94 (Gil. 46) (1859). 1 Am. & Eng. Enc. Law. (Rev. Ed.), p. 211. Dickinson v. Railroad Co., 7 W. Va. 390, p. 413 (1874). Hess v. Draffen, 99 Mo. App. 58; 74 S. W. Rep. 440 (1903).

sume this liability, he may avoid it by noting the instrument.[6]

§ 3. **Must examine the record of instruments.** When an abstracter is employed to make an abstract of title, the fair and reasonable import of his undertaking is that he will make a full and true search and examination of the records relating to the title to the property and will note on the abstract accurately every transfer, conveyance or other instrument of record in any way affecting the title. The record, and not a marginal reference to it made by the register of deeds, is what determines the character and legal effect of an instrument, and the abstracter does not fulfill his duty by merely assuming the accuracy of such a marginal reference, without examining the instrument itself. A register of deeds, in making a reference to a partial release on the margin of the record of a mortgage, erroneously described it as a full satisfaction. An abstracter, in preparing an abstract of title for his employer, relied on this reference which gave the date and place of record, and, without examining the record of the release, described it as a satisfaction of the mortgage. It was held that the abstracter was guilty of negligence in not examining the record of the release and in relying on the marginal reference, and that the trial court erred in not so instructing the jury.[7] He may not rely on extracts made from a will, without examining the record of it.[8]

§ 4. **Instruments inserted must be correctly set out.** An abstracter may present to his employer a mere index to the records, with the mutual expectation and understanding that the employer will examine for himself the records referred to. But where the abstract purports to state the contents, substance and vital parts of a deed, will or other instrument, and there is nothing on the face of the abstract to indicate that a mistake or error has been made in the statement, the employer is justified in relying on it, without making an original investigation and he is not guilty of negligence in so doing. An abstract of title contained a certificate that it contained all conveyances as shown by the records in the register's office. The body of the

[6] Dodd v. Williams, 3 Mo. App. 278 (1877). Gilman v. Hovey, 26 Mo. 280 (1858).

[7] Wacek v. Frink, 51 Minn. 282; 53 N. W. Rep. 633; 38 Am. St. Rep. 502 (1892).

[8] Wilson v. Tucker, 3 Starkie, 154 (1822).

abstract referred to a will as part of the chain of title, as shown by a will book which was required to be kept in the county clerk's office. It was held that having referred to the will, although it was not embraced in the terms of his certificate, the abstracter was required to set out its terms correctly and was liabel for injury for not having done so.[9]

§ 5. **Liability for errors or omissions.** Where an abstract contains an error, and through reliance on its correctness the employer has sustained an injury, he may hold the abstracter liable therefor to the extent of the injury sustained, provided the error is such as could have been avoided by the exercise of ordinary care and skill on the part of one possessing qualifications adapted to the business of abstracting. Where an abstracter furnished to his employer an abstract which purported to set out the contents of a will as devising the property in fee, while in fact it devised only a life estate to the mortgagor, he failed to exercise a proper degree of care and skill, and the employer, injured by relying on the abstract, is entitled to recover.[10] An abstracter is liable for damages sustained through his failure to disclose in the abstract an unsatisfied judgment which is a lien on the land referred to in it,[11] or to set out a sale of the land for taxes,[12] or taxes on the land,[13] or a special assessment,[14] or to note prior recorded conveyances of the land,[15]

[9] Equitable Assn. v. Bank, Tenn. ; 102 S. W. Rep. 901 (1907).

[10] Equitable Association v. Bank, Tenn. ; 102 S. W. Rep. 901 (1907).

[11] Western Loan Co. v. Abstract Co., 31 Mont. 448; 78 Pac. Rep. 774; 107 Am. St. Rep. 435 (1904). Brown v. Sims, 22 Ind. App. 247; 53 N. E. Rep. 779; 72 Am. St. Rep. 308 (1899). Denton v. Title Co., 112 Tenn. 320; 79 S. W. Rep. 799 (1903). Young v. Lohr, 118 Iowa, 624; 92 N. W. Rep. 684 (1902). Zweigardt v. Birdseye, 57 Mo. App. 462 (1894). Gilman v. Hovey, 26 Mo. 280 (1858). Ziegler v. Commonwealth, 12 Pa. St. 227 (1849). Russell v. Abstract Co., 87 Iowa 233; 54 N. W. Rep. 212; 43 Am. St. Rep. 381 (1893). Provident Trust Co. v. Walcott, 5 Kan. App. 473; 47 Pac. Rep. 8 (1895).

[12] Chase v. Heaney, 70 Ill. 268 (1873).

[13] Philadelphia v. Anderson, 142 Pa. St. 357; 21 Atl. Rep. 976 (1891). Trimble v. Stewart, 35 Mo. App. 537 (1889).

[14] Morange v. Mix, 44 N. Y. 315 (1871).

[15] Dickle v. Abstract Co., 89 Tenn. 431; 14 S. W. Rep. 896; 24 Am. St. Rep. 616 (1890). Savings Bank v. Ward, 100 U. S. 195 (1879).

or a prior recorded mortgage,[16] or a pending suit to recover the land,[17] or a suit in attachment,[18] or to report correctly the quantity of land previously conveyed.[19] He is liable where the abstract presents as a conveyance an instrument which does not purport to convey the land.[20] An appeal from a judgment does not destroy the lien, but only suspends the execution of the judgment. An abstracter of title must show a judgment which is a lien on the property under examination, although it has been appealed from.[21]

§ 6. **Conveyance by grantee before he obtains title.** Under the recording laws of some states a deed by a grantee of land, made and recorded before he obtained title, is not constructive notice to persons subsequently dealing with the land, and an abstracter is not guilty of negligence in not finding it and setting it out in the abstract of title.[22] One purchasing subsequent to the deed conveying the legal title to his grantor is not charged by the records with knowledge of a mortgage by his grantor, made and recorded before the latter obtained title.[23] A search for mortgages against one who has held or is holding the title to the property in question should begin from the time of the conveyance to him, and a mortgage on the property given by

[16] Dundee Mtge. Co. v. Hughes, 20 Fed. Rep. 39 (1884). Peabody Bldg. Assn. v. Houseman, 89 Pa. St. 261; 33 Am. Rep. 757 (1879). Houseman v. Girard Assn., 81 Pa. St. 256 (1876). Smith v. Holmes, 54 Mich. 104; 19 N. W. Rep. 767 (1884). Van Schaick v. Sigel, 58 How. Pr. 211; 60 How. Pr. 122 (1880). McCaraher v. Commonwealth, 5 Watts & Serg. 21 (1842). Morano v. Shaw, 23 La. Ann. 379 (1871). Allen v. Hopkins, 62 Kan. 175; 61 Pac. Rep. 750 (1900). Economy Assn. v. Title Co., 64 N. J. L. 27; 44 Atl. Rep. 854 (1899). Batty v. Fout, 54 Ind. 482 (1876). Fox v. Thibault, 33 La. Ann. 32 (1881). Wood v. Ruland, 10 Mo. 143 (1846). But see Dodd v. Williams, 3 Mo. App. 278 (1877).

[17] Rankin v. Schaeffer, 4 Mo. App. 108 (1877). Thomas v. Schee, 80 Iowa 237; 45 N. W. Rep. 539 (1890).

[18] Security Abstract Co. v. Longacre, 56 Neb. 469; 76 N. W. Rep. 1073 (1898).

[19] Clark v. Marshall, 34 Mo. 429 (1864.) See Am. Trust Inv. Co. v. Nashville Abstract Co. (Tenn.), 39 S. W. Rep. 877 (1896).

[20] Thomas v. Schee, 80 Iowa, 237; 45 N. W. Rep. 539 (1890).

[21] Denton v. Title Co., 112 Tenn. 320; 79 S. W. Rep. 799 (1903).

[22] Dodd v. Williams, 3 Mo. App. 278 (1877), where the authorities are reviewed at length.

[23] Farmers L. & T. Co. v. Maltby, 8 Paige Ch. 361 (1840). Turk v. Funk, 68 Mo. 18 (1878). Morse v. Curtis, 140 Mass. 112; 2 N. E. Rep. 929 (1885).

him and recorded before the date of the deed to him will not be constructive notice.[24] When a searcher finds a deed or other instrument filed for record on a certain day, diligence requires that he shall examine the records for the whole of that day. While with respect to the time of filing instruments for record the law takes notice of fractions of a day, the general principle that the law takes no notice of fractions of a day applies to the execution of deeds and mortgages, where the hour of their execution does not appear. The rule requires a searcher to go back to the time of the execution of the deed, and hence he must commence his search at the beginning of the day.[25]

§ 7. **Reason for the rule.** The reason for the rule that a mortgage or conveyance by a grantor made and recorded before he obtained title is not constructive notice is founded on the recording laws. They provide for indices of grantors and grantees to enable the public to examine the records. In searching them to trace the title from the government, the patentee of the land is found. From the time he obtained title, his name is searched in the alphabetical list of grantors to find a conveyance from him. When a conveyance from him to A. is found he becomes a stranger to the title, and the search is continued in the alphabetical list of grantors from the date of the conveyance to A. to find a conveyance from him. When he conveys to B. the search ceases as to him and begins with B. from the date of the conveyance. This method of search goes on down to conveyances to Z. the present owner. It would be unscientific, if not absurd, to require the searcher to examine for each grantee from A. to Z., from the government down to the present time, to discover whether anyone of them conveyed or mortgaged the land before he got title. And again, in searching back to the government patent from Z., the present known owner of the land, the search for conveyances by Z. would be back to his deed from Y. and the search back from that date would be against Y. and not against Z. Back of Y. the search would be seriatim against each of those through whom he claimed from the respective dates of the conveyances from him to the date of the

[24] Calder v. Chapman, 52 Pa. St. 359 (1866). See State v. Bradish, 14 Mass. 296 (1817). McCusker v. McEvoy, 10 R. I. 610 (1874). Rawle on Cov. Title (5th Ed.), § 259.

[25] Higgins v. Dennis, 104 Iowa 605; 74 N. W. Rep. 9 (1898).

conveyance to him. It would be a hardship out of proportion to the advantage to be gained to require the examiner to follow back to the government patent the names of each of the grantees who at any time held the title, in order to be sure that no one of them had ever conveyed or mortgaged the land before he got title to it. One may, perhaps, feel that a searcher may be required to look back for a day or two to see whether a grantee had conveyed or mortgaged the land before he actually got the title, but if he is required to look back for a day or two, the principle involved will require him to look back for ten, twenty or any number of years beyond what is called "the line of title."

It is not necessary to inquire whether this rule is of universal application according to the American system of constructive notice under the recording laws. The method of searching the indices of grantors and grantees as designed by those laws is being abandoned, and search by means of a tract index is taking its place. A tract index will disclose at a glance any conveyance or mortgage from a grantee, recorded within a short time before he obtained title and will give actual notice of any such instrument. When actual notice of a recorded instrument is given to a searcher of the title he and, if he is an agent, his principal are deprived of the protection of the recording laws.

§ 8. **Continuation of abstract from a specified date.** Where an abstracter is employed to make and furnish an abstract of title to certain land from and after a certain specified date, he is not bound to inquire or state whether the title which vested in any grantee during the time covered by the search is affected by any prior mortgage or conveyance, or by any estoppel growing out of any covenants in any such conveyance. This rule may be based on the principles and necessities of the recording acts, which were discussed in the preceding section, as well as on the limited employment of the abstracter, which assumes that no instruments of conveyance are to be examined prior to the specified date. But, in the absence of instructions to the contrary, an abstracter is bound to examine and certify for judgments the name of any grantee who has taken title to the land during the period covered by the search. This examination must be for judgments at any time, which, in the business of abstract making, means for a time beyond which judgments necessarily will be barred by the statute of limitations. He does

not perform his duty by examining for judgments back to the specified date from which he is to note conveyances, for a judgment against a grantee, rendered at any time within the limitation of the statutes, will at once become a lien on the delivery of the deed to him. The very purpose of an abstract is to show the true condition of the title at the date to which it is continued, and no rule under the recording acts precludes the necessity for searching for judgments at any time against every grantee of the property in question. These propositions seem simple and certain. In one case, however, an abstract was ordered from October 1, 1872 to date, November 24, 1877. The abstracter did not search for judgments prior to October 1, 1872, and did not note on the abstract an unpaid and unsatisfied judgment rendered in June, 1870 against A. who acquired title to the premises in October, 1874, as shown by the abstract. One entry on the abstract simply said: "No judgments." The court said: "This, taken in connection with the rest of the abstract, clearly means that there are no judgments entered of record since October 1, 1872, which in any way affect the title or create any lien upon the premises."[26] This decision clearly holds that the contract to furnish an abstract to certain lands from and after a specified date creates no obligation on the abstracter to note, against a grantee of the title after that date, an unsatisfied judgment which only appears of record prior to that date, but it is not founded on good principles of abstract making and is too narrow and technical. A diligent and skillful abstracter will search every grantee of the title for judgments at any time, and if he has been instructed not to search prior to a specified date, that fact should be expressly stated in his certificate. In view of the purposes for which abstracts are ordered, it is not likely that he will ever receive any such instructions. No vague certificate that there are "no judgments" should shield him from liability for omitting to make the search for judgments at any time.

§ 9. **Certificate to abstract limiting liability.** An abstracter may not limit his liability by a vague and obscure certificate to the abstract. If he has not performed his duty in a thorough and skillful manner, or if he discovers that he cannot furnish a

[26] Wakefield v. Chowen, 26 Minn. 379; 4 N. W. Rep. 618 (1880).

complete and trustworthy abstract, it is his duty to state such matters clearly in his certificate and to give his employer such notice as will put the latter on his guard. If no such notice is clearly given, the employer will have a right to rely on the completeness of the abstract.[27] Where an abstract of title contains a certificate that the records have been carefully examined in the offices of the county clerk, the clerk of the district court and the county treasurer and that there are no liens on the property "upon or in the records of either of the said three offices, to-wit, county clerk's office, office of the clerk of the district court and treasurer's office, except as hereinbefore set out," the abstracter is not liable on account of the omission from the abstract of a prior mortgage on the property, then of record in the office of the register of deeds.[28] A certificate by an abstracter that he finds of record no liens on the property in question is equivalent to a certificate that there is none of record.[29]

§ 10. **Relation of trust and confidence.** A person engaged in the business of making abstracts of title occupies a relation of trust and confidence toward those who employ him, and, in the sacredness of its nature, this relation is second only to that which a lawyer sustains to his client. He is bound to disclose to his employer all pertinent information acquired by him in the course of his investigations, and must not disclose to anyone else anything which might be prejudicial to his employer's interests. He becomes familiar with the histories of titles, handles private papers and learns of weaknesses and defects in his employer's titles. He is debarred from making use of such information for his private gain or advantage and may be made to account for any abuse of his confidential employment. He may not purchase for himself any adverse title to that of his employer, and may not purchase land, the title to which he has been employed to search, so long as his employer has a prospective interest in it. If he offends in these respects, equity will require that he hold the title in trust for his principal. He will be held to a strict responsibility in the exercise of his duties.[30]

[27] Chase v. Heaney, 70 Ill. 268 (1873).

[28] Thomas v. Carson, 46 Neb. 765; 65 N. W. Rep. 899 (1896).

[29] Ziegler v. Commonwealth, 12 Pa. St. 227 (1849). Philadelphia v. Anderson, 142 Pa. St. 357; 27 Atl. Rep. 976 (1891). Tripp v. Hopkins, 13 R. I. 99 (1880).

[30] Vallette v. Tedens, 122 Ill.

§ 11. **Names of judgment defendants.** One of the undertakings of an abstracter is to set forth the liens on the property in question, and perhaps judgments are the most difficult liens with which he has to deal. In making an abstract of title he is, with respect to judgments, the agent and representative of subsequent purchasers, incumbrancers or judgment creditors, and he must know the principles of constructive notice which govern them. As such, he must be skillful in determining whether judgments of record are against persons in whom he is for the time interested, and whether the name of a judgment defendant is the same in legal effect as the name for which he is searching the judgment docket. He must know the rules which govern names and be familiar with the principles of idem sonans. While a judgment in most states is a general lien, it is, in strictness, simply a charge against any interest of the judgment defendant in lands within the county where rendered, existing by virtue of a statute and operating through a record against the person of such defendant. In cases of mortgages and such instruments, the lien owes its force and existence partly to the contract of the parties, but in cases of involuntary liens, such as judgments and attachments, the lien owes its entire force and vitality to the provisions of the statute.[31] Assuming jurisdictional facts, a judgment must have a date of rendition, must be for a definite amount of money and must name the judgment plaintiff and defendant. In treating of judgments here we shall confine ourselves to the name of the judgment defendant, the one against whom the judgment was rendered. The record of a judgment can only be constructive notice of that which is contained within itself, and in order to be a charge on the land of the judgment defendant as against subsequent purchasers, incumbrancers and judgment creditors, it must contain his name with such reasonable accuracy that if they should examine it they would obtain from it actual notice of all the rights which were intended to be created or conferred by it. While a judgment is good between the parties even if the name

607; 14 N. E. Rep. 52; 3 Am. St. Rep. 502 (1887).

[31] Shirk v. Thomas, 121 Ind. 147; 22 N. E. Rep. 976 (1889). Bell v. Davis, 75 Ind. 314 (1881). Jones v. McNarrin, 68 Me. 334 (1878). Moore v. Davis, 58 Mich. 25 (1885). Barnard v. Campau, 29 Mich. 162 (1874).

of the defendant is seriously incorrect in the record, as against subsequent purchasers, incumbrancers and judgment creditors, it is the duty of a plaintiff to see that his judgment is in all respects properly entered and that the name is so set forth in the record as to disclose the identity of the judgment defendant.[32] To import constructive notice, the record of the judgment must show whom it is against, without reference to other facts or instruments.[33] A searcher of the records, representing subsequent dealers with the subject-matter of the judgment, is entitled to assume that the plaintiff knew the name of his debtor and that the clerk of the court made no mistake in entering up the judgment.

§ 12. Under the recording acts subsequent purchasers, incumbrancers and judgment creditors are called on to search the records, and they have a right to rely on the names of judgment defendants as they find them entered on the records. If they find the surname for which they are searching, but find an entirely different given name from the one they are searching for, they are entitled to conclude that the judgment is not against the person in whom they are interested. Where a judgment is on record against William M—, intending purchasers are not chargeable with notice that it is really against H. W. M— in whom they are interested, and that William M— and H. W. M— are the same person. The record of the judgment does not disclose these facts and does not necessarily suggest inquiry which would lead up to an ascertainment of such facts.[34] Helen and Ellen are distinct names, and a judgment against Ellen D— is not constructive notice of a charge against the lands of Helen D—.[35] Where the record of a judgment does not show that the judgment defendant is known both as Charles

[32] Wood v. Reynolds, 7 Watts & Serg. 406 (1844). Ridgeway's Appeal, 15 Pa. St. 177 (1850). Hutchinson's Appeal, 92 Pa. St. 186 (1879). Saylor v. Commonwealth, 5 Atl. Rep. 227 (1886). Pa. not reported.

[33] Disque v. Wright, 49 Iowa 538 (1878).

[34] Johnson v. Hess, 126 Ind. 298; 25 N. E. Rep. 445 (1890). Taylor v. Harrison, 47 Texas 454; 26 Am. Rep. 304 (1877). Birdsall v. Russell, 29 N. Y. 220, 250 (1864). Jones v. McNarrin, 68 Me. 334; 28 Am. Rep. 66 (1878). Acer v. Westcott, 46 N. Y. 384; 7 Am. Rep. 355 (1871). Gilchrist v. Gough, 63 Ind. 576 (1878).

[35] Thomas v. Desney, 57 Iowa 58 (1881).

and Conrad E—, a subsequent purchaser who is ignorant of the fact is not bound to inquire about it.[36]

§ 13. Constructive notice flowing exclusively from matters of record can never be construed to be more extensive than the facts stated in the record. The record must conclusively create notice, or there is no notice. Under the recording acts, the record of a judgment is notice, and not prima facie notice, of its contents and of the charge created by it, to all persons subsequently dealing with its subject-matter.[37] In matters of constructive notice, the question is not whether the abstracter representing the subsequent dealer with the land had the means of obtaining, and by suspicion, prudent caution or inquiry, might have obtained the knowledge in question, but whether by not obtaining it he was guilty of gross or culpable negligence.[38] From these well established principles it inevitably follows that the rule that what is sufficient to put a purchaser or his agent on inquiry is notice of whatever the inquiry would have led to, applies to actual, but not to constructive notice.[39] In order to put a searcher on inquiry dehors the record, an inference arising from the record must be necessary and unquestionable.[40]

§ 14. The abbreviations of a man's given name are so common that without any violence to the law of the land, the courts may take judicial notice of them.[41]

§ 15. **Middle name, middle initial.** By the common law a full name consists of one given name and one surname or patronymic. The two constitute the legal name of the person. The law knows but one given name, and the omission or insertion of the middle name or the initial letter of that name is immaterial. It is no misnomer to improperly include or exclude the initial of a middle name; it is unimportant and suggests nothing.[42] But it has been held that while this rule ap-

[36] Grundies v. Reid, 107 Ill. 304 (1883).

[37] Pomeroy Eq. Jur. §§ 649, 654, 655.

[38] See 2 Sugden on Vend. & Purch., 14th Ed. 571, 572.

[39] Battenhausen v. Bullock, 11 Ill. App. 665 (1882). Grundies v. Reid, 107 Ill. 304 (1883). Lowry v. Smith, 97 Ind. 466 (1884). Moore v. Davis, 58 Mich. 25 (1885). McLouth v. Hurt, 51 Texas, 115 (1879). Johnson v. Hess, supra.

[40] McMechan v. Griffith, 3 Pick. 154 (1825).

[41] Fenton v. Perkins, 3 Mo. 144 (1832).

[42] Games v. Stiles, 14 Pet. (U. S.) 322 (1840). Franklin v. Tal-

plies to contracts, pleading, evidence, service of process and criminal proceedings, it does not relieve a plaintiff from the duty of designating the person against whom he has obtained judgment, by using his middle initial.[43]

It is the duty of the abstracter to point out carefully in his certificate the names with middle initials, which he has and has not searched. While the word Junior or its abbreviation "Jr." is merely a matter of description and is no part of a person's legal name, it is the duty of the abstracter in proper cases to certify to his principle any use or non-use of the designation which he may find on the record of judgments.

§ 16. **Surnames, idem sonans.** It is with surnames that the greatest difficulty arises. Absolute accuracy in spelling names is not required in legal documents and records. Courts are not fastidious in enforcing absolute precision in orthography, and in the pronunciation of proper names far greater latitude is indulged in than in any other class of words. The name of the judgment defendant may be written in the record in quite a different manner from that in which he writes it, but in the matter of names, orthography is not important if the sound is the same. If a name when pronounced conveys practically the same sound as another name when pronounced; if a name in-

madge, 5 Johns. 84 (1809). Roosevelt v. Gardinier, 2 Cow. 463 (1824). Milk v. Christie, 1 Hill 102 (1841). Edmundson v. State, 17 Ala. 179 (1850). State v. Smith, 12 Ark. 622; 56 Am. Dec. 287 (1852). Morgan v. Woods, 33 Ind. 23 (1870). Schofield v. Jennings, 68 Ind. 232 (1879). Gross v. Village, 177 Ill. 248; 52 N. E. Rep. 372 (1898). Claflin v. Chicago, 178 Ill. 549; 53 N. E. Rep. 339 (1899). Allison v. Thomas, 72 Cal. 562; 14 Pac. Rep. 309 (1887). See authorities cited in these cases.

[43] Wood v. Reynolds, 7 Watts & Serg. 406 (1844). In this case it was said: "It is certain that an initial, standing with a name of baptism, is no part of it in pleading, but it follows not that an omission of it is to be disregarded as an index of notice to purchasers. Persons of the same name are individuated by various additions; sometimes by title, profession, residence or seniority; sometimes by numerals; sometimes by color of complexion or hair; sometimes by an initial. The absence of the badge (middle initial M.), in this instance misled a purchaser and though the judgment is good against the defendant, it is bad against the terre tenant. It was the plaintiff's business to see his judgment properly entered; and he must bear the loss caused by his negligence, rather than one who is in no default whatever." See also Hutchinson's Appeal, 92 Pa. St. 186 (1879).

correctly spelled when ordinarily pronounced sounds like the correct name as commonly pronounced, it is idem sonans. Whether two names are idem sonans is a question of pronunciation and not of spelling; it depends less on rule than on usage. It does not matter how names are spelled, if the attentive ear finds difficulty in distinguishing them when pronounced.[44] It is an old and well established rule that if two names, according to the ordinary rules of pronouncing the English language, may be sounded alike without doing violence to the letters found in the variant orthography, the names are idem sonans and the variance is prima facie immaterial. If an abstracter decides that two names are idem sonans and he searches both, his search against both must be complete, and if he leaves off a judgment against one of them, he is liable for any loss which may be occasioned thereby.[45]

§ 17. **Foreign names.** The searcher is not required to know how the name he is examining may be spelled according to the rules applicable to foreign languages, for the records must be kept in the English language. The rule of idem sonans does not apply to bind third persons by constructive notice of public records where two foreign names, pronounced alike, in fact begin with a different letter of the alphabet. Although Yoest and Joest are pronounced alike in German, a searcher for judgments against Yoest need not consult indices under the letter J.[46]

[44] Myer v. Fegaly, 39 Pa. St. 429; 80 Am. Dec. 534 (1861). Commonwealth v. Donovan, 95 Mass. 571 (1866). Robson v. Thomas, 55 Mo. 581 (1874). People v. Fick, 89 Cal. 144; 26 Pac. Rep. 759 (1891).

[45] Commonwealth v. Owen, 2 Wkly. Notes Cases, 200 (1875).

[46] Heil and Lauer's Appeal, 40 Pa. St. 453 (1861). For alphabetical lists of words held to be and not to be idem sonans, see 16 Am. & Eng. Enc. of Law, 122 and 21 Am. & Eng. Enc. Law (second ed.) 313.

CHAPTER II.

TO WHOM ABSTRACTER IS LIABLE.

§ 18. **An abstracter is liable only to his employer.** An abstracter is liable only to the person who employed him, and he is not liable to a third person to whom his employer furnished the abstract for the purpose of procuring money or property, or with whom the employer had some business in which the abstract was used.[1] An abstracter is not bound to know that his certificate is for the use and reliance of anyone except his employer, and it cannot be assumed that he gives it for the use of any other person. He contracts with the person who employs and pays him that he will give a certificate which shall state the facts, but he enters into no relation of contract or otherwise in respect to it with any other person. If another relies on it to his injury, he cannot have redress on the abstracter, for the reason that the latter assumed no duty for his protection. To constitute actionable negligence the person causing the injury must owe a duty to the person sustaining the loss.[2] In discussing this rule it was said: "It is not every one who suffers a loss from the negligence of another that can maintain a suit on such ground. The limit of the doctrine relating to actionable negligence is, that the person occasioning the loss must owe a duty arising

[1] Equitable Assn. v. Bank, Tenn. ; 102 S. W. Rep. 901 (1907). Dundee Mortgage Co. v. Hughes, 20 Fed. Rep. 39; 10 Sawyer 145 (1884). Schade v. Gehner, 133 Mo. 252; 34 S. W. Rep. 576 (1895). Savings Bank v. Ward, 100 U. S. 195 (1879). Zweigardt v. Birdseye, 57 Mo. App. 462 (1894). Mallory v. Ferguson, 50 Kan. 685; 32 Pac. Rep. 410; 22 L. R. A. 99 (1893). Morano v. Shaw, 23 La. Ann. 379 (1871). Thomas v. Schee, 80 Iowa, 237; 45 N. W. Rep. 539 (1890). Commonwealth v. Harmer, 6 Phila. 90 (1865). Symns v. Cutter, 9 Kan. App. 210; 59 Pac. Rep. 671 (1900). Wood v. Ruland, 10 Mo. 143 (1846).

[2] Day v. Reynolds, 23 Hun 131 (1880). Commonwealth v. Harmer, 6 Phila. R. 90 (1865). Houseman v. Girard Mutual, 81 Pa. St. 256 (1876). National Savings Bank v. Ward, 100 U. S. 195 (1879). Fish v. Kelly, 17 C. B. (n. s.) 194 (1864).

from contract or otherwise to the person sustaining such loss. Such a restriction on the right to sue for want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligences of men could be followed down the chain of results to the final effect."[3] "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."[4]

§ 19. **Applications of the rule.** An abstracter furnished an abstract to the husband of a certain woman. He delivered it to a building association to procure a loan on the property. The attorney of the association found that the title was in the wife, and, relying on the statements in the abstract, the association made a loan to her. The abstracter had no knowledge of the purpose for which the husband intended to use the abstract, and it contained an error which covered up a defective title. It was held that there was no privity between the association and the abstracter, and that it could not maintain an action against him for a loss suffered by it through the defective title.[5] An abstracter who prepares an abstract for the purpose of having it submitted to a loan broker is not liable to one who purchases the loan from the broker, takes the loan in reliance on the title as shown by the abstract, and sustains a loss by reason of defects in it.[6] Where an abstract was ordered by one who purposed to loan money on the property, the abstracter is liable to him for failure to present a correct abstract, although the expense was paid by the borrower.[7] A contract relation exists between the owner of a piece of land and an abstracter employed to make an abstract of title to it, though the employment was made by an agent of the owner, who did not disclose

[3] Kahl v. Love, 37 N. J. L. 5 (1874).

[4] Winterbottom v. Wright, 10 Mees. & W. 109.

[5] Equitable Association v. Bank, Tenn. ; 102 S. W. Rep. 901 (1907).

[6] Talpey v. Wright, 61 Ark. 275; 32 S. W. Rep. 1072; 54 Am. St. Rep. 206 (1895). See Dundee Mortgage Co. v. Hughes, 20 Fed. Rep. 39 (1884). Houseman v. Girard Assn., 81 Pa. St. 256 (1876).

[7] Page v. Trutch, 18 Fed. Cas. 995; 3 Cent. L. J. 559 (1876). See § 49.

his principal.[8] The administrator of the deceased employer may sue for a breach of the contract on the part of the abstracter to use ordinary care and skill in the preparation of the abstract.[9] But an abstracter is not liable to the widow of his employer, who is a devisee of the land.[10]

§ 20. **Effect of statutory bond.** Where the statute requires an abstracter to give bond for the payment "of any and all damages that may accrue to any party or parties by reason of any error, deficiency or mistake in any abstract or certificate made and issued" by him, he is liable on his bond to third persons for injuries suffered by them through his negligence or want of skill.[11]

§ 21. **Liability to third persons under privity of contract.** There may be special circumstances under which an abstracter will be held to have placed himself in such relation to a third person that he will owe him protection, although there is no contract between them. The fact that the abstracter knows that the abstract prepared by him is to be used in the negotiation of a sale of, or mortgage on the property described in it, to advise the purchaser or lender as to the condition of the title, does not affect the rule that he is liable to his employer only. There must be something more than a mere knowledge of such facts, something which brings the abstracter and the purchaser or lender into relations of privity. They must have some connection in the transaction,—some mutual interest in it, which is recognized by some act of the abstracter, and which brings about some relation other than that of actual contract between them. This relation is called privity of contract.[12] There must be a republication, a renewal or a delivery of the abstract by the abstracter to the third person, in order to make the latter privy to the contract and to entitle him to sue on it.

§ 22. **Examples of privity of contract.** Where one about to

[8] Young v. Lohr, 118 Iowa 624; 92 N. W. Rep. 684 (1902). See Denton v. Title Co., 112 Tenn. 320; 79 S. W. Rep. 799 (1903).

[9] Security Abstract Co. v. Longacre, 56 Neb. 469; 76 N. W. Rep. 1075 (1898). Knight v. Quarles, 4 Moore 532; 2 B. & B. 102 (1820).

[10] Schade v. Gehner, 133 Mo. 252; 34 S. W. Rep. 576 (1896).

[11] Gate City Abs. Co. v. Post, 55 Neb. 742; 76 N. W. Rep. 899 (1898). See Allen v. Hopkins, 62 Kan. 175; 61 Pac. Rep. 750 (1900).

[12] Zweigardt v. Birdseye, 57 Mo. App. 462 (1894).

borrow money procured a certificate of search and paid for it, and the lender, not feeling satisfied with its correctness, took it to the abstracter, who examined it, made another search, said it was correct and handed it back to him, and the lender paid out the money on the loan and lost because the certificate was wrong, it was held that the republication of the certificate, the renewal and delivery to the lender made a privity of contract and that the abstracter was liable to the lender.[13] Where the abstracter knew that an abstract was ordered by the owner of the property for the purpose of procuring a loan from a certain mortgage company and for the exclusive use and benefit of that company, and knew that the company would rely on the abstract in examining the title to the property, and delivered the abstract when it was completed to an agent of the company, it was held that there was privity of contract between the abstracter and the company, and that there could be no doubt as to his liability to the company for injuries sustained by reason of the failure of the abstract to disclose an unsatisfied judgment which was a lien on the property.[14] An abstracter, who at the request of the owner of lands furnishes an abstract of title to a third person, knowing that the latter will use it in determining whether the title is safe for the purposes of a loan and that in making the loan he will rely entirely on the correctness of the abstract, and who certifies that it is a true and correct search of the records and represents to such third person on inquiry by him that there are no defects in the title, is liable for loss sustained by the latter through defects in the title not disclosed by the abstract.[15]

[13] Sievers v. Commonwealth, 87 Pa. St. 15 (1878).

[14] Western Loan & Sav. Co. v. Abstract Company, 31 Mont. 448; 78 Pac. Rep. 774; 107 Am. St. Rep. 435 (1904). See to the same effect, Economy Building Assn. v. West Jersey Title Co., 64 N. J. L. 27; 44 Atl. Rep. 854 (1899).

[15] Brown v. Sims, 22 Ind. App. 247; 53 N. E. Rep. 779; 72 Am. St. Rep. 308 (1899). In this case it was said: "It is very well known that the owner of real estate seldom incurs the expense of procuring an abstract of title from an abstracter except for the purpose of thereby furnishing information to some third person or persons who are to be influenced by the information thus provided. If the abstracter in all cases be responsible only to the person under whose employment he performs the service, it is manifest that the loss occasioned thereby must in many cases, if not in most cases, be remediless. Where the abstracter has no knowl-

§ 23. Where the owner of a tract of land and the intending purchaser agreed that the owner should order the abstract of title and that the cost should be equally divided between them, and the abstracter knew when it was ordered that it was to be used as evidence of title in making a sale of the land to the purchaser, and after the sale the purchaser suffered damage through a defect in the abstract on which he had relied, it was held that there was privity of contract between the purchaser and the abstracter and that the abstracter was liable to the purchaser for the injury.[16] Where an abstracter is employed by the owner of a tract of land to make an abstract of title to it, and is also

edge that some person other than his employer will rely in a pecuniary transaction upon the correctness of the abstract, the general rule that his duty extends only to his employer must be maintained. How far exceptions ought to be countenanced we will not now undertake to say, but, confining ourselves to the case before us, we are of the opinion that the facts stated in the complaint are sufficient to put the defendant to his answer. Here there was actual communication between the abstracter and the person for whose information the abstract was prepared. The appellant (lender) had refused to make the loan until he should be furnished with an abstract, and the abstracter was informed that his abstract was to be used for the particular purpose of inducing the plaintiff (the lender) to make a loan secured by mortgage on this real estate. He delivered the abstract to the appellant for his use and certified it to be a correct and true abstract of title; and he represented to the appellant, before he made the loan, that the title was free and unincumbered, and that there were no liens on the real estate; and the appellant informed the abstracter that he would rely entirely on the abstract and his representation; and the abstracter informed the appellant, before he made the loan, that he could so rely; and the appellant did so rely in making the loan, having no other knowledge or information. We think it cannot properly be said appellee (the abstracter) did not owe a duty to the appellant arising under the contract, the attending circumstances indicating that it was the understanding of all the parties that the service was to be rendered for the use and benefit of the appellant, the particular person who was to loan his money in reliance upon what the abstracter should do and represent in the premises. If such a duty did arise the appellee was bound to the person to whom he owed the duty to perform it with reasonable care and skill. However broad and inclusive the statements of the general doctrine in the decided cases, we think that when the facts involved and the reasons stated in the opinions are considered, it must be concluded that the view we take of the pleading before us is sustained by the authorities."

[16] Denton v. Title Co., 112 Tenn. 320; 79 S. W. Rep. 799 (1903).

employed to prepare a deed from the owner to the purchaser, it must be held that there is a republication of the abstract to the purchaser and that he is entitled to recover for any defects in the abstract through which he has suffered injury.[17]

According to this case, where a mortgage is left with an abstracter with instructions to have it recorded and to bring down the abstract of title to the land to cover the record of the mortgage, there is doubtless privity of contract between the abstracter and the mortgagee, which will entitle the latter to recover for any injury he may suffer by reason of a defect or omission in the abstract. Where an association, proposing to make a loan on certain property, permitted the borrower to order the abstract, and the borrower, explaining the proposed loan, persuaded the abstracter to omit from the search all reference to a mortgage then on the property, on the assurance that it should be paid and satisfied out of the proceeds of the loan from the association, but the mortgage was not so satisfied, and on the foreclosure of it the association lost a part of its loan, it was held that the abstracter was liable to it for the amount of its loss.[18]

§ 24. **Comments on some cases.** It is sometimes said in opinions that the weight of authority is to the effect that an abstracter is liable only to his employer and not to third persons, and this expression may possibly convey the idea that there are some authorities holding that an abstracter is liable to a stranger to the contract. There are cases holding that privity of contract exists between the abstracters and third persons under the special circumstances in the cases and that republication, renewal or delivery of the abstract by the maker to the third person creates a privity of contract which takes the case out of the general rule. As we have seen, these cases recognize the exception, but there is no case which repudiates the rule. In a celebrated book of reference it is said: "The general doctrine is that the liability extends only to the person for whom the abstract is made; but there are well considered cases holding that where a person makes an abstract for one party to a trans-

[17] Dickle v. Abstract Company, 89 Tenn. 431; 14 S. W. Rep. 896; 24 Am. St. Rep. 616 (1890).

[18] Peabody Assn. v. Houseman, 89 Pa. St. 261; 33 Am. Rep. 757 (1879). Houseman v. Girard Assn., 81 Pa. St. 256 (1876).

action, which he knows will be used and which in fact is used to influence the action of the other party thereto, he is liable to such other party."[19] The authority cited for the last statement is Dickle v. Abstract Co.. supra, and the argument in the opinion in that case is broad enough to sustain the doctrine as stated. But the controlling feature in that case was that the deed to the purchasers was prepared by the abstracter, and the decision in the case was, not that the abstracter was liable to third persons, but that "the allegations of the bill clearly made a privity of contract between the purchasers and the defendant." Whether so slight a circumstance as the preparation of the deed was enough to make a privity of contract between the purchasers and the abstracter was a matter for judicial decision, but the opinion in the case does not treat in a definite and satisfactory manner the principles involved.[20] In Denton v. Title Co., supra, the Dickle case was followed and again great stress was laid in the opinion on the facts that the abstracter knew that the abstract was to be used in a sale and that the purchaser relied on the correctness of it. There is in the opinion no intimation that the purchaser under the circumstances was an undisclosed principal for whom the vendor acted when he ordered the abstract for joint account of both parties, and the opinion does not fairly meet any of the difficulties in the case. But in a later case [21] the same court broadly announced the doctrine that an abstracter is not liable to third persons unless there has been a republication of the abstract to them, and it placed the Dickle and Denton cases among those holding that privity of contract existed under the special circumstances.

§ 25. **Comments on the rule.** It is a sound legal principle which requires that the person causing an injury must owe a duty to the person sustaining loss, in order to constitute actionable negligence, but if any class of persons is to be excepted from it, abstracters of title should be. Few persons order ab-

[19] 1 Am. & Eng. Encl. Law, 2nd Ed., p. 221.

[20] This case is criticised in a note in 24 Am. St. Rep. 617, where it is assumed to hold that an abstracter is liable to third persons who refuse to purchase the property without an abstract and rely on it after it is furnished by the vendor.

[21] Equitable Assn. v. Bank, Tenn. ; 102 S. W. Rep. 901 (1907).

stracts, or continuations of them, in order to be assured that nothing adverse or unknown to them appears of record against their titles. It may be broadly stated that abstracts are ordered and paid for by owners of land in anticipation of some dealing with the title, and that the abstracter knows in a general way that someone, relying on the correctness of his work, probably will part with something of value in dealing with it. It is therefore just and equitable that he should be called on to answer to anyone who may be injured for want of care and skill on his part. It does not follow, however, that courts should make abstracters of title an exception to the rule. They may look closely into the record of a case to discover whether any act of the abstracter has brought him into privity of contract with the person injured, but it is a question of policy for the legislature and not for the courts to determine whether abstracters should be an exception to this principle. The legislatures of some states have made them such.[22]

It is to be noted, however, that many abstracters have not waited for the legislatures to extend their liabilities to third persons, but have held themselves out as liable to any injured person who dealt with the title and relied on the correctness of their work.[23]

§ 26. **Liability under special contract.** Where an abstracter certified, guaranteed and warranted to his employer, his "heirs, devisees and grantees" that the abstract contained a full, true and complete search of the records, when in fact there was an error in it through which a grantee under a mesne conveyance from the grantee of the employer suffered injury, it was held that such remote grantee was not entitled to maintain an action for damages for a breach of the guaranty. The court said: "The plaintiff certainly was not a party to the contract; neither was she privy thereto * * * The plaintiff is not the immediate grantee of (the employer), but she derived her title through a mesne conveyance; and if she is entitled to claim any benefit from defendant's contract, why is not her grantee, and any subsequent grantee, however remote?" [24]

[22] See Gate City Abs. Co. v. Post, 55 Neb. 742; 76 N. W. Rep. 899 (1898). Allen v. Hopkins, 62 Kan. 175; 61 Pac. Rep. 750 (1900).

[23] This position has been taken by the abstract companies of Chicago for many years past.

[24] Glawatz v. People's Guar. Search Co., 63 N. Y. Supp. 691; 49 App. Div. 465 (1900).

CHAPTER III.

SUITS AGAINST AN ABSTRACTER.

§ 27. **Breach of duty, pleading.** As the undertaking of an abstracter is that he will furnish a full, complete and correct statement of the condition of the records as affecting the title to certain land, a breach of his duty is a violation of his contract, and an action against him for such breach is in contract and not in tort. The allegation of carelessness and negligence in doing his duty does not change the action from one on contract to one in tort, but refers merely to the manner in which the breach of duty was committed.[1] The gravamen of an action against an abstracter for failure properly to disclose the state of the records is non-feasance and not misfeasance, which marks the distinction between negligence and fraud. The allegation in describing his dereliction of duty should be "carelessly and negligently" and not "falsely and fraudulently."[2] A plaintiff may aver that he was injured by the wrongful acts of the defendant, but if the specific facts averred show that there could have been no damages, he can recover none, for, in pleading, specific averments always control general allegations. An averment that plaintiff was compelled to pay out money to protect his title and to litigate the question of priority of liens is a legal conclusion, and in order to be effective it must be sustained by specific averments of facts, showing that there was a legal compulsion in the payment and substantial damages as the result of the failure of the abstracter to perform his duty. Where the plaintiff averred that he was about to purchase a tract of land and ordered an abstract of title to it, that the abstract was erroneous in that it failed to set out a mortgage, that he relied

[1] Russell v. Abstract Co., 87 Iowa 233; 54 N. W. Rep. 212; 43 Am. St. Rep. 381 (1893). Thomas v. Schee, 80 Iowa 237; 45 N. W. Rep. 539 (1890); Lattin v. Gillette, 95 Cal. 317; 30 Pac. Rep. 545; 29 Am. St. Rep. 115 (1892).

[2] Smith v. Holmes, 54 Mich. 104; 19 N. W. Rep. 767 (1884).

on the abstract and that he was compelled to take up the mortgage, but he did not aver that he had purchased the land, it was held that the complaint did not state a cause of action against the abstracter.[3] Where one has the superior lien on land he must show by proper averments how he was injured by an omission in the abstract, which compelled him to take up an inferior lien.[4] In a suit against an abstracter an allegation that plaintiff hired the abstracter to furnish a full and complete abstract is sufficient without an allegation that it was to be made from any particular date. An allegation that plaintiff by due course of law was vested and dispossessed of the land which he bought relying on the abstract states facts and not a conclusion of law. An allegation that the abstracter furnished an abstract showing that H. was the owner of the land "without any incumbrances" sufficiently states that the abstract showed that there were no incumbrances.[5] The complaint against an abstracter for negligently furnishing a defective abstract, by reason of which plaintiff lost the property bought by him, need not show that plaintiff has exhausted his remedy against his grantor, or that his grantor is insolvent. Such matters constitute an affirmative defence.[6]

§ 28. **Plaintiff must aver and show that he relied on abstract.** In a suit for breach of the contract on the part of the abstracter to use due diligence and skill in the performance of his duty, it must be alleged and proved that the plaintiff relied on the abstract and was injured by so doing.[7] Plaintiff cannot recover for a breach of the contract to use ordinary care and skill in the preparation of the abstract where it appeared that the abstract failed to disclose the delinquent and current taxes, but that

[3] Batty v. Fout, 54 Ind. 482 (1876). See Puckett v. Abstract Co., 16 Texas Civ. App. 329; 40 S. W. Rep. 812 (1897).

[4] Williams v. Hanley, 16 Ind. App. 464; 45 N. E. Rep. 622 (1896).

[5] Hirshiser v. Ward, Nev. ; 87 Pac. Rep. 171 (1906).

[6] Hirshiser v. Ward, Nev. ; 87 Pac. Rep. 171 (1906). Gate City Abs. Co. v. Post, 55 Neb. 742; 76 N. W. Rep. 471 (1898). Morange v. Mix, 44 N. Y. 315 (1871).

[7] Young v. Lohr, 118 Iowa 624; 92 N. W. Rep. 684 (1902). See Smith v. Holmes, 54 Mich. 104; 19 N. W. Rep. 767 (1884). Trimble v. Stewart, 35 Mo. App. 537 (1889). Symns v. Cutter, 9 Kan. App. 210; 59 Pac. Rep. 671 (1900). Hirshiser v. Ward, Nev. ; 87 Pac. Rep. 171 (1906).

plaintiff did not examine the abstract and relied on the verbal statement of the abstracter that the title was good and that all taxes had been paid. Plaintiff may not plead one cause of action and recover on another.[8] There may be no recovery against an abstracter for failure to show in the abstract a judgment lien on the property, where at the time the search was made the employer had bought and paid for the property and he advanced no money on the faith of the search.[9]

§ 29. **Defence to action for breach of duty.** In an action for damages against an abstracter for failure to disclose a judgment against the property, which judgment the plaintiff had voluntarily paid, it is competent for defendant to show that the judgment defendant, at the time it was paid by plaintiff, had other unincumbered real estate in the county, subject to execution and sufficient to pay the debt.[10]

§ 30. **Generally concerning actions against abstracter.** A judgment sustaining a demurrer to a complaint against an abstracter will not be reversed where the complaint shows that plaintiff is at most entitled to only nominal damages.[11] In an action against an abstracter for failure to note a tax sale, plaintiff need not prove that there was a record of the sale. The law will presume that the proper officer did his duty and made the record at the proper time and place.[12] The fact that one giving an order for an abstract designates a certain assistant in the office as the person whom he wishes to do the work does

[8] Trimble v. Stewart, supra.

[9] Roberts v. Sterling, 4 Mo. App. 593 (1879).

[10] Roberts v. Sterling, supra.

[11] Williams v. Hanley, supra. Cases decided on demurrer. Brown v. Sims, 22 Ind. 247; 53 N. E. Rep. 779; 72 Am. St. Rep. 308 (1899). Batty v. Fout, 54 Ind. 482 (1876). U. S. Co. v. Linville, 43 Kan. 455; 23 Pac. Rep. 597 (1890). Williams v. Hanley, 16 Ind. App. 464; 45 N. E. Rep. 622 (1896). Lattin v. Gillette, 95 Cal. 317; 30 Pac. Rep. 545; 29 Am. St. Rep. 115 (1892). Symns v. Cutter, 9 Kan. App. 210; 59 Pac. Rep. 671 (1900). Puckett v. Abstract Co., 16 Texas Civ. App. 329; 40 S. W. Rep. 812 (1897). Russell v. Abstract Co., 87 Iowa 233; 54 N. W. Rep. 212; 43 Am. St. Rep. 381 (1893). Economy Assn. v. Title Co., 64 N. J. L. 27; 44 Atl. Rep. 854 (1899). Dickle v. Abstract Co., 89 Tenn. 431; 14 S. W. Rep. 896; 24 Am. St. Rep. 616 (1890). Wood v. Ruland, 10 Mo. 143 (1846). Hirshiser v. Ward, Nev. ; 87 Pac. Rep. 171 (1906). See Smith v. Holmes, 54 Mich. 104; 19 N. W. Rep. 767 (1884).

[12] Chase v. Heaney, 70 Ill. 268 (1873).

not make the assistant his agent and thereby absolve the abstracter from liability for an erroneous abstract. Such a designation is a mere request and not an employment. The abstracter is not obliged to accede to the request and if he does so it is merely a matter of accommodation.[13] The liability of a deceased abstracter for negligence in preparing an abstract survives against his personal representative.[14] Where an employer sustained a loss through a defective abstract, and afterward died, it was held that his personal representative might maintain an action against the abstracter.[15]

§ 31. **When remedy is in tort.** Where one has been injured by a conspiracy between an abstracter and others whereby the abstracter limited his certificate to searches in certain offices, well knowing that in another office there were records of liens on the land, with intent to deceive and injure any person who might subsequently deal with the land, the remedy is in tort and not in contract. Where the entries on the abstract are in all respects, true, according to the terms of the certificate, and the abstract and certificate are satisfactory to the person who ordered them, there is no breach of contract. The conspiracy to defraud by leaving off instruments not covered by the certificate is the basis of the action.[16]

§ 32. **No loss, no recovery.** An abstracter is not liable for a defect in the abstract, which does not cause an injury; there can be no recovery where no loss is shown. It is necessary that there be actual damages as the direct consequence of the failure of the abstracter to perform his duty. The loss, in order to be charged to him, must result from the non-feasance of the abstracter.[17] Where at the time the search was ordered

[13] Van Schaick v. Sigel, 58 How. Pr. 211; 60 How. Pr. 122 (1880).

[14] Allen v. Clark, 7 L. T. N. S. 781; 11 W. R. 304 (1863). Humboldt Assn. v. Ducker's Ex'r, Ky. ; 82 S. W. Rep. 969 (1904).

[15] Knights v. Quarles, 4 Moore 532; 2 B. & B. 102 (1820). Security Abstract Co. v. Longacre, 56 Neb. 469; 76 N. W. Rep. 1075 (1898).

[16] Thomas v. Carson, 46 Neb. 765; 65 N. W. Rep. 899 (1896).

[17] Batty v. Fout, 54 Ind. 482 (1876). Williams v. Hanley, 16 Ind. App. 464; 45 N. E. Rep. 622 (1896). U. S. Co. v. Linville, 43 Kan. 455; 23 Pac. Rep. 597 (1890). Roberts v. Sterling, 4 Mo. App. 593 (1879). Kimball v. Connolly, 33 How. Pr. 247 (1866). Puckett v. Abstract Co., 16 Texas Civ. App. 329; 40 S. W. Rep. 812 (1897).

the employer had bought and paid for the property, and he advanced no money on the faith of the search, the abstracter was not liable for an omission in the abstract.[18] He is not liable for failure to note a judgment, the lien of which is never enforced, but is permitted to expire under the statute of limitations, or where the purchaser's loss results from the inherent invalidity of his title, as where he purchased a void tax title which was removed as a cloud on the title.[19]

§ 33. **Measure of damages.** Generally speaking, the measure of damages for the failure of an abstracter to perform his undertaking is the actual loss suffered by his employer. When a mortgage or a judgment has been omitted from the search, the abstracter is liable for the amount necessarily paid in order to free the property from the lien. But he is liable only for a loss which is the direct consequence of his mistake. The owner of real estate procured an abstract of the title to be made for the purpose of obtaining a loan on it. The loan was made on a mortgage on the premises, and the money was paid over to the borrower. There was a judgment of $26.95 against a former owner of the property, which was a lien on it, but it was erroneously omitted from the abstract. After the loan was made the property was sold on execution on the judgment, and, as there was no redemption, the sheriff made a deed to the purchaser. Afterward these facts were ascertained, and the purchaser for the sum of $400.00 deeded the property back to the person who had ordered the abstract. Suit was thereupon brought by the owner against the abstracter for the $400.00 paid to recover the property. It was held that the abstracter was not liable—that the loss occurred from the non-payment of the judgment and not from the error of the abstracter—that it was no injury of which she could complain to have the money paid to herself on effecting the loan, instead of having some part of it applied to the satisfaction of an outstanding judgment. The court said: "No one can say what actually would have been done under a different

[18] Roberts v. Sterling, supra; But "loss" is a relative term, and failure to keep that which one has is a loss, which may be covered under a policy of title insurance. Foehrenbach v. Title and Trust Co., Pa., ; 66 Atl. Rep. 561 (1907). See § 169.

[19] Denton v. Title Co., 112 Tenn. 320; 79 S. W. Rep. 799 (1903).

state of facts from those which actually occurred. It is no answer to say that she could, or that she might have paid the judgment or prevented a sale; it does not make it certain that it would have been done. The payment was not a necessary consequence of a correct return by the clerk (who made the abstract) and without such a direct and necessary result to flow from his act or omission, the defendant cannot be made chargeable with damages."[20] The measure of damages for omitting a mortgage from the abstract is the amount necessarily paid to take up the omitted mortgage and free the title from it.[21] Where one purchased land relying on an abstract of title furnished to him by an abstracter, which omitted all mention of an attachment on the land, and the land was afterward sold and a deed executed under the attachment before the purchaser had notice of the omission, the measure of his damages is not the amount of the judgment in attachment, but the value of the land.[22] A purchaser of land who has notice of a mortgage omitted by mistake from the abstract can make no claim against the abstracter for payments made by him after such notice.[23] Where an abstracter is negligent in his duty and fails to show a prior lien on the property, and his employer takes a mortgage on the property for his loan, relying on the abstract, the employer is entitled to bring suit against him at once without waiting for any default in the mortgage and may receive the difference in value between the security he contracted for and that which he actually received.[24] An abstracter is responsible for the amount loaned on a mortgage, on the faith of his abstract showing no prior lien, when in fact the property was mortgaged for more than its value, and on foreclosure of the prior mortgage the money loaned on the faith of his certificate was lost.[25] In speaking of the measure

[20] Kimball v. Connolly, 33 How. Pr. 247 (1866). See Denton v. Title Co., 112 Tenn. 320; 79 S. W. Rep. 799 (1903).

[21] Allen v. Clark, 7 L. T. (n. s.) 781 (1863).

[22] Security Abstract Co. v. Longacre, 56 Neb. 469; 76 N. W. Rep. 1073 (1898).

[23] Brega v. Dickey, 16 Grant's Chan. (Ontario) 494 (1869).

[24] Lawall v. Groman, 180 Pa. St. 532; 37 Atl. Rep. 98; 57 Am. St. Rep. 662 (1897). See Lilly v. Boyd, 72 Ga. 83 (1883). Scholes v. Brook, 64 L. T. (n. s.) 674 (1891).

[25] Fox v. Thibault, 33 La. Ann. 32 (1881).

of damages in a suit against an abstracter it was said: "He (plaintiff) paid $2,500 for a full fee-simple title. He actually got one-sixteenth of that title and fifteen-sixteenths of a life estate for and during the life of (F. S.). His loss was the difference between what he paid and the present worth of what he actually received, estimating the true value of the lot at $2,500. Nor do we think he is entitled to interest on the loss, for the reason that he has had the uninterrupted possession of the lot and has enjoyed the rents and profits thereof."[26] Where an attorney wrongfully retains an abstract of title and is sued for conversion, the proper measure of damages is the exact cost of procuring another abstract similar to the one retained.[27]

§ 34. **Measure of damages, duty of plaintiff.** Where one who has ordered an abstract has suffered injury by reason of an error in it, he must see to it that his loss is not swollen by any act of omission or commission on his part, but he is not called upon to do an act which will not affect his own damages, though it would be of service to the abstracter.[28] Where plaintiff employed defendant to make for her an abstract of title to real estate which had been sold on execution, and defendant, with no fraudulent purpose, made a mistake in the abstract whereby it appeared, and she was led to believe, that she had ten days longer to redeem the land from the sheriff's sale than she actually had according to the record, and she learned of the mistake one day before the time for redemption actually expired, it was held that she could not recover damages from defendant on account of her inability to redeem the land in

[26] Keuthan v. Trust Co. 101 Mo. App. 1; 73 S. W. Rep. 334 (1903).

[27] Watson v. Cowdrey, 23 Hun 169 (1880).

[28] Van Schaick v. Sigel, 64 How. Pr. 122 (1880). "It is said that when plaintiff became aware that the search was incorrect, he was bound to communicate that fact to the defendant, that the latter might have bought up the Coffin mortgage before the costs of foreclosure had been added to it. It is undoubtedly true that the plaintiff was under obligation to make reasonable exertions to prevent the increase of the damages likely to fall upon himself, and thus incidentally to protect defendant, but it was not his duty to go one step farther. He was not bound to know that the defendant could or would buy or settle the Coffin mortgage, and he is not to suffer because he did not think of that plan."

so short a time, unless she used ordinary diligence in endeavoring to get the money to redeem after the mistake was discovered, and that in the exercise of ordinary diligence it was her duty to inform defendant promptly of the mistake, so that he might have an opportunity to raise the necessary money for her, avert the consequences of the mistake and save himself from liability.[29]

§ 35. **Commencement of action; limitation of action.** An action against an abstracter to recover damages arising from an error or omission in the abstract is based on contract and not on tort. A statute governing actions for relief on the ground of fraud or mistake and providing that the cause of action shall not be deemed to have accrued until the fraud or mistake has been discovered does not apply to such an action. It is governed by the law of contracts, and the statute of limitations begins to run from the date of the delivery of the abstract containing the defect, even though the error be not discovered and no special damage result therefrom, until long after the abstract is delivered. The contract of the abstracter is not a continuing one, so that a new cause of action accrues whenever special damage is suffered by its breach. With the delivery of the abstract the contract is executed and the breach is complete.[30] The doctrine is well settled that in an action against an abstracter for negligence or unskillfulness the statute of limitations commences to run from the time the negligent or unskillful act was committed, and the employer's ignorance of the negligence or unskillfulness can not affect the bar of the statute.[31] The cause of action is the breach of duty and not the consequential damage resulting therefrom, and the statute begins to run from the time of the breach, and not from the time of the consequential damage.[32]

[29] Roberts v. Abstract Co., 63 Iowa 76; 18 N. W. Rep. 702 (1884).

[30] Russell v. Abstract Co., 87 Iowa 233; 54 N. W. Rep. 212; 43 Am. St. Rep. 381 (1893). Wilcox v. Plummer's Ex'rs, 4 Pet. 172 (1830). Fox v. Thibault, 33 La. Ann. 32 (1881). Provident Loan Trust Co. v. Walcott, 5 Kan. App. 473; 47 Pac. Rep. 8 (1895).

[31] Crawford v. Gaulden, 33 Ga. 173, p. 183 (1862). Bank v. Waterman, 26 Conn. 324 (1857). Governor v. Gordon, 15 Ala. 72 (1848). Mardis v. Shackleford, 4 Ala. 493 (1842). Lattin v. Gillette, 95 Cal. 317; 30 Pac. Rep. 545; 29 Am. St. Rep. 115 (1892).

[32] Schade v. Gehner, 133 Mo.

§ 36. **Statute of limitation.** A statute of limitation for an action on a contract, obligation or liability founded upon an instrument in writing refers to contracts, obligations or liabilities arising from instruments of writing executed by the parties who are sought to be charged, in favor of those who seek to enforce contracts, obligations or liabilities, and does not apply to a certificate of title or abstract of title given by an abstracter who was employed to examine and make a written report of the condition of the title, where damages are claimed for negligence of the abstracter in giving an incorrect abstract or certificate. Such a statute refers to contracts, obligations and liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately. In discussing this question it was said: "The written certificate of title given to the plaintiff by the defendants, although an instrument in writing, is not an instrument upon which their liability is founded. * * * The contract which is the basis of the plaintiff's cause of action herein does not rest in or grow out of this certificate, nor does the certificate contain any obligation or contract that can be enforced, or which is susceptible of a violation on the part of the defendants, or under which any liability can accrue against them. The obligation assumed by them was that created at the time of their acceptance of the employment by the plaintiff and antedated the making of the certificate. The certificate is not the evidence of this obligation, but is merely evidence of the act done by them in purported satisfaction of the obligation assumed by them in accepting their employment. Instead of establishing the contract made between them and the plaintiff, it is the evidence relied upon by him to establish the breach of that contract, and necessarily presumes that the contract was complete before it was given. As in the case of an erroneous deed drawn by an attorney, or a defective plat made by a surveyor, or a wrong prescription given by a physician, it is only evidence in support of the averment that the implied contract for the exercise of skill and care was violated, and is not the contract

252; 34 S. W. Rep. 576 (1895). Lilly v. Boyd, 72 Ga. 83 (1883). Moore v. Juvenal, 92 Pa. St. 484 (1880). Rankin v. Schaeffer, 4 Mo. App. 108 (1877). Lawall v. Groman, 180 Pa. St. 532; 37 Atl. Rep. 98; 57 Am. St. Rep. 662 (1897).

itself. That was created by the oral agreement of employment and was broken by the giving of a faulty writing."[33]

SUITS BROUGHT BY ABSTRACTER.

§ 37. **Suits by an abstracter.** Where an abstracter is employed to make an abstract of title to certain lands and to certify to a certain number of printed copies, in the absence of a special contract, he is entitled, as compensation for certifying to the copies, merely to the reasonable value of his services, and not to the value of all the copies regarding them as originals, and not according to their value to his employer.[34] Where an abstracter agrees to have an abstract of title completed within a specified time, and he knows that it must be completed by that time in order to be of any value to his employer, he cannot recover for his services if it is not promptly done.[35] Where defendant, with the intention of securing a loan on his property from an abstracter, signed a written agreement to pay him a certain sum for services in searching the title, whether it was accepted or not, the contract was binding, though plaintiff refused to make the loan offered.[36] A railroad company filed with the chancery clerk a deed for certain lands, to be recorded as required by law. The clerk rendered a bill for $13.60 for recording and $185.70 for abstracting the deed. The railroad company refused to pay the abstract fees, but the court held that the laws of the state provided that the clerk should make tract indices and keep them down to date, and that the company was required to pay for abstracting the deed and posting the lands under the proper captions.[37]

[33] Lattin v. Gillette, 95 Cal. 317; 30 Pac. Rep. 545; 29 Am. St. Rep. 115 (1892). Quoted with approval and followed in the Provident Loan Trust Co. v. Walcott, 5 Kan. App. 473; 47 Pac. Rep. 8 (1895).

[34] Kenyon v. Improvement Co., 135 Mich. 103; 97 N. W. Rep. 407 (1903).

[35] Griffin v. Arlit, 96 N. Y. Supp. 1033 (1905).

[36] Title Guarantee & Trust Co. v. Steinberg, 103 N. Y. Supp. 857 (1907).

[37] Yazoo R. R. Co. v. Edwards, 78 Miss. 950; 29 So. Rep. 770 (1901).

CHAPTER IV.

COUNTY OFFICERS AS ABSTRACTERS.

§ 38. **Generally.** In some states in early times when lands were cheap, titles were simple and the volumes of the records were few in number, a recorder or register of deeds, as a part of his official duty, was required by law or custom to search the records in his office, and to give information as to whether there were on record deeds, mortgages or other instruments concerning certain land, and to refer persons to them, so that they might be enabled to judge for themselves or to take counsel as to the manner in which the title was affected or the estate encumbered by them. He was not required to examine such records and to give an opinion as to the legal effect of such instruments, but he was bound to find such instruments as affected the title and to give an abstract of them. If he did not make the search with care and skill and gave incorrect information, he was guilty of a breach of duty for which he and the sureties on his official bond were liable. It was said in one case: "In Pennsylvania it has ever been a portion of the duty of the prothonotary to make searches. It is an incident to his office as a keeper of the records of the county. The fee bill gives him compensation for his services and for his certificates."[1] In this case it was held that where the official custodian of public records searched the records and gave a certificate as to the existence or non-existence of mortgages, judgments and other liens, he was liable to the purchaser of the property for damages incurred by him through a mistake in the certificate; that the giving of such a certificate was an incident to his office and a part of his duty; that the sureties on his official bond were liable for errors made by him in the course of such work, and that it was immaterial that no seal of his office was attached to the certificate given by him. In an earlier case it was held that a recorder, giving

[1] Ziegler v. Commonwealth, 12 Pa. St. 228 (1849).

a certificate that he had searched the records and could find no mortgage on certain land, and charging and receiving the fee allowed by law, was liable together with the sureties on his official bond if it afterward appeared that there then was a mortgage on record, and the party obtaining the certificate was prejudiced by the error.[2] Where a recorder makes an abstract as a part of his official duty and certifies that certain property is free from incumbrance when in fact it is mortgaged for more than it is worth, and a new loan is made by the person ordering the abstract, and the debt is lost by reason of the foreclosure of the prior mortgage, the recorder and the sureties on his official bond are liable for the loss. The action is ex contractu and does not arise from a quasi offence.[3] Where it is the duty of the officer to make abstracts, he is liable on his official bond for the errors of his deputies and clerks in performing the service.[4]

In a Canadian case it was held that the registrar is the person by whom all searches are to be made. A person inquiring into the state of a title has no right to make searches and inspect the books, but he may require the registrar to make searches and produce for his inspection the books and instruments of the office relating thereto.[5]

§ 39. **County officers not public abstracters.** Under the statutes of some states certain county officers are required to make searches, but they are not public abstracters to the extent that they may be required to make a complete list of all liens and transfers affecting particular pieces of land. They may only be required to search for certain instruments to which their attention is specifically directed by the applicant and to certify to such instruments if they are recorded or filed in their offices.[6] In setting forth the duty of the clerk,

[2] McCaraher v. Commonwealth, 5 Watts & Serg. 21; 39 Am. Dec. 106 (1842). See Lusk v. Carlin, 5 Ill. 396 (1843). Commonwealth v. Owen, 2 Wkly. Notes Cases 200 (1875).

[3] Fox v. Thibault, 33 La. Ann. 32 (1881).

[4] Van Schaick v. Sigel, 58 How. Pr. 211; 60 How. Pr. 122 (1880). Kimball v. Connolly, 32 How. Pr. 247 (1866). Peabody B. & L. Assn. v. Houseman, 89 Pa. St. 261; 33 Am. Rep. 757 (1879).

[5] Ross v. McLay, 26 Up. Can. Com. Pleas, 190 (1876).

[6] Dirks v. Collin, 37 Wash. 620; 79 Pac. Rep. 1112 (1905).

who was ex officio recorder of deeds, to make searches on the order of interested persons, it was said: "The clerk, when he is called upon to make a search, is entitled to have such information, either by the names of parties or by reference to the records in his office, as will enable him, by examining the indices or the record to which he is referred, to ascertain the premises in relation to which he is required to make a search. A party desiring a search cannot carve out a description of lands at his will and require the services of the clerk to ascertain the condition of the title. He must furnish the clerk with such information as to the state of the title as will enable him to ascertain the present status of the title by a simple inspection of the records. Nor is the clerk required, upon a call for a search by such a description, to certify that he can find no deeds on record for the premises described, for the premises may be embraced in the general description in some deed on record and he is under no obligation to employ a surveyor or to make inquiries or examinations outside of his office to ascertain facts which do not appear distinctly by his records. He may decline to make such a search until he is furnished with the information that will enable him to find and identify the premises by his records. Nor is he under obligation to certify that a description he certifies from the record includes a part only of the premises described in the order for the search. If he gives the description as it is on the records with all its qualifications and recitals, it is the province of counsel to advise as to whether the description covers the entire premises."[7]

§ 40. **Officers should not be required to make abstracts.** With the increase of wealth titles have become complex, and with the great increase in population and dealings in land, the number of volumes of records has become very large in most offices. It is no longer practicable for a man to be a searcher of public records merely because he has been elected to an office which makes him the custodian of them. It has become necessary for men to devote themselves to the business of examining records and to prepare themselves for the work by special study and education. Sureties on the bond of a

[7] State v. Deacon, 44 N. J. Law, 559 (1882).

recorder or register of deeds should not now be held to guarantee the competency of their principal, his deputies and clerks, skillfully to perform the responsible duty of examining public records for those who may have occasion to deal in real estate. Speaking generally along the lines of modern development, all a recorder or register of deeds, as such, should have to do with searching public records is to furnish facilities for the examination of the books in his office by the public and by the agents whom members of the public may employ for that service.[8] He is fully occupied with the due administration of the work of recording in his office and with the furnishing of certified copies of records to those who may desire them. Everyone is bound to take notice of the records which he makes, but neither law nor custom now presumes that a prudent man may rely on his search and certificate, simply because he is in charge of the records and has given a small penal bond which possibly may be available to one injured by his lack of care or want of skill.[9]

§ 41. **Statutes authorizing officers to make searches.** The statutes of some states provide for the making of tract indices to the records in the recorders' offices and for the making of abstracts of title by the recorders and their assistants. Where such statutes are in force it is not contemplated that the work will be done by the officers themselves, but provision is made for the hiring of skilled and competent persons to do the work under the general supervision of the officers. Under such statutes the officer does not make abstracts strictly in his official capacity, but rather as the agent of the county, and the county in making them acts in its private and not in its governmental capacity. Whether the abstracter is liable for errors on his official bond, or whether the county may be called on to pay for his errors out of its general funds may not be clear from the terms of the statute. Even where the county is made responsible for the care and skill of the recorder in performing such work, the situation may be far from satisfactory to those who patronize his abstract office, for unless a fund is appropriated by the proper authority, which may be used by the

[8] See § 59.

[9] § 59.

recorder in the payment of losses, there is no way in which an injured person may be indemnified except by obtaining judgment against the county. Under some statutes clerks of courts must certify on abstracts of title as to the existence or non-existence of judgments of record in their offices.[10] These are matters of a legislative policy which has not been followed extensively.

§ 42. **Clerk held not liable for error in a certificate.** Where there was no statute requiring an officer to search the records and to certify as to the result of his search, and a clerk of court, who was neither a lawyer nor an abstracter, appended his certificate to an abstract of title, stating that there was no suit pending affecting the land, and received twenty-five cents which was the fee allowed by law for a certificate alone, it was held that it would not be presumed, in the absence of evidence, that the clerk agreed to make a careful search and correct report, but the burden of showing an express agreement to do so rested on the plaintiff. The clerk in such a case will not be held liable for mere errors of judgment or want of skill in determining the legal effect of a suit pending in the court of which he is clerk, and the plaintiff relying on the certificate, in the absence of such an agreement, must himself bear any loss arising from an honest error of judgment on the part of the clerk. Where an officer receives no compensation for making a search, he is not liable for giving a certificate which the law does not require him to make, and where the making of such certificate is not a part of his official duty, he is not liable for any error contained in it, unless he is guilty of fraud or willful misstatement.[11]

§ 43. **Register guilty of misconduct.** Where a register of deeds, over his official signature, knowingly, purposely and designedly, but neither corruptly nor with intent to defraud, made and delivered to a person a certificate that he had examined the title to certain land and found no incumbrance on it, when he well knew that the records showed an attachment suit and that the certificate was false, he was guilty of mis-

[10] See § 131.

[11] Mallory v. Ferguson, 50 Kan. 685; 32 Pac. Rep. 410; 22 L. R. A. 99 (1893).

conduct in office, although it was no part of his official duty to make searches or to issue such a certificate.[12]

§ 44. **Where the officer acts as private abstracter.** It is evident from the cases which have been reviewed that the duty of officers to make abstracts is not satisfactory or well defined, and that there is no well established law governing the right of an injured person to recover damages against an officer and the sureties on his official bond for a mistake in an abstract made by him. But, unless he is prohibited by statute from so doing, there is no reason why a county officer may not hold himself out to the public as a professional abstracter and make abstracts of title for hire, so long as his private business does not interfere with the performance of his official duties. Where the recorder is not required by law to search the records and certify to the result of his labor, he may contract as an individual to make such searches and certificates. If he gives an erroneous certificate and one is injured by it, he incurs no liability as an official, but he is liable for breach of his contract as an abstracter.[13]

[12] State v. Leach, 60 Me. 58; 11 Am. Rep. 172 (1872).

[13] Mechanics Bldg. Assn. v. Whitacre, 92 Ind. 547 (1883). Smith v. Holmes, 54 Mich. 104; 19 N. W. Rep. 767 (1884).

CHAPTER V.

OPINIONS AND CERTIFICATES OF TITLE.

§ 45. **Generally.** The business of certifying to the state and condition of titles to real estate is one of great importance and responsibility. It has long been pursued by solicitors and conveyancers in England, and many eminent lawyers in that country have devoted themselves to the law of real property. In this country such certificates were primarily the work of lawyers, and opinions of title based on an examination of an abstract of the title are still rendered by lawyers in every city and county seat. Abstracters of title formerly confined their work to furnishing in an abridged form a compilation of the title as shown by the records, but, with the formation of title companies with large capital stock, the work of certifying to the state of titles has become one of the features of the business of such companies. Whether such certificates are signed by lawyers or by title companies, they are the results of labor done by lawyers, for such labor requires an acquaintance with the laws of real property and a practical legal knowledge of titles, which can be derived only from long experience in dealing with them. One who can examine a title and state its condition must have prepared himself by a course of special study and education. Reports which are given by lawyers are usually called opinions of title, and those which are given by title companies are usually called certificates of title, but they are to the same effect and are governed by the same legal rules. A corporation organized for the purpose of examining, certifying and insuring titles to real estate, which in all matters relating to conveyancing and certifying to titles assumes to discharge the same duties as an individual conveyancer or attorney, is subject to the same responsibilities, and its duty to its employer is governed by the principles applicable to attorney and client.[1]

[1] Ehmer v. Title Co., 156 N. Y. 10; 50 N. E. Rep. 420 (1898); affirming 34 N. Y. Supp. 1132; 89 Hun 120 (1895).

§ 46. **Rule of liability for an opinion or certificate.** One who gives an opinion or a certificate of title undertakes to act with reasonable care and ordinary skill in examining the title, and in passing on the legal questions involved. He is not liable for every error or mistake made in determining such questions, for in this respect no one is bound to know all the law, and there are many questions in titles about which there may be doubt. In such matters he must exercise judgment as a skilled and cautious examiner. This is about as definite as his duties and liabilities may be defined. It is difficult, if not impossible, to lay down any general rule which will control the measure of his liabilities in all cases. Good faith and honest service must be given, but questions of the presence or absence of reasonable care and ordinary skill must be determined by the facts in each case.[2] A mere error of judgment on a doubtful question of the construction of a statute is not to be regarded as evidence of a want of competent knowledge or skill, or of negligence, but a disregard of a plain statute is so to be regarded.[3] Where one who certified that a title was good, in examining a transfer by tax deed under a judicial proceeding, saw that the record showed jurisdiction in the court to render the judgment on which the deed was founded, and that the parties to the judgment and the title claimed under it were identical in name and description, it was not actionable negligence for him to fail to make inquiries dehors the record to ascertain any possible defect in the proceedings, or error in the name or description of the parties.[4] A deed conveyed certain realty to two grantees "to be owned equally between them." A certificate of title stated that there was no incumbrance on the property and that the title "now remains in the name of the within named grantees." It was held that nothing in the certificate implied that the grantees held each an undivided moiety of the whole realty.[5] An attorney examining an abstract of title must carefully examine each instrument affecting the title.[6] If a client informs his attorney that he has made

[2] O'Barr v. Alexander, 37 Ga. 195 (1867). Caverly v. McOwen, 123 Mass. 574 (1878).

[3] Caverly v. McOwen, supra.

[4] Keuthan v. St. Louis Trust Co., 101 Mo. App. 1; 73 S. W. Rep. 334 (1903).

[5] Tripp v. Hopkins, 13 R. I. 99 (1880).

[6] Ireson v. Pearman, 5 Down. & R. 687 (1825).

inquiries into certain matters relating to the land, which are outside of the abstract, and leads him to believe that he is satisfied on these points, it is not negligence in the attorney to omit to look into such matters.[7]

§ 47. **Rule of liability, continued.** Where the attorney, employed to examine the title to land with a view of placing a mortgage on it, knew that a building was being built on the premises, it was his duty to ascertain whether there were liens for materials and labor furnished, and his failure to do so, whereby the mortgagee was damaged, was a breach of his contract of employment.[8] One who certifies to a purchaser that the title to land is good, is guilty of actionable negligence where the title was derived from a decree of foreclosure of a mortgage which had been partially released, but the decree directed the sale of that part of the land which had been released, though reference had been made to the release in the bill of foreclosure. In examining title to land which had been sold under foreclosure, it is actionable negligence not to observe that the decree orders the sale of land which has actually been released from the mortgage, instead of land which is still subject to the mortgage.[9] If a title company employed to conduct the purchase of a certain house and lot, negligently procures from the owner of that and an adjoining house, and delivers to its employer, a deed covering the adjoining house instead of the one intended by both the grantor and the grantee, the deed does not constitute a good conveyance, and the company is liable to its employer for the injury. In such a case the duty of reducing the damages arising from the negligence of the company, by selling for the highest obtainable price the premises so deeded, does not devolve on the grantee on the discovery by him of the mistake in the deed; and the value of the property through error described in the deed, as compared with the value of the property intended to be conveyed, is of no consequence on the question of damages. The grantee of the erroneous deed procured its reformation and obtained the right

[7] Waine v. Kempster, 1 F. & F. Nisi Prius Cases, 695 (1859). See Scholes v. Brook, 64 L. T. (n. s.) 837 (1891).

[8] Humboldt Assn. v. Ducker's Ex'r, Ky. ; 82 S. W. Rep. 969 (1904).

[9] Byrnes v. Palmer, 45 N. Y. Supp. 479; 18 N. Y. App. Div. 1 (1897).

property, but he found that it was incumbered by a mortgage. On being evicted by a foreclosure of the mortgage, the grantor being insolvent, it was held that he was entitled to recover from the title company the amount of the purchase money paid by him, that being less than the amount of the mortgage.[10]

§ 48. **Not a guarantor or indemnitor.** Where one gives a certificate that the title is good, he does not thereby become a guarantor or an indemnitor, but he is liable for any mistake arising from want of due care or diligence, or from ignorance of his business.[11] In one case it was held that where an attorney certifies that the title to property is good, he thereby warrants that the title will not only be found good at the end of contested litigation, but that it is free from any palpable, grave doubt, or serious question of its validity; that an attorney who conducts a suit to foreclose a mortgage taken in reliance on his certificate is not entitled to extra compensation because of labor and time consumed in such suit in contesting the validity of the mortgage upon a question within the scope of his certificate; that whatever extra labor or time is bestowed in conducting the suit on account of such question is bestowed for his own benefit in maintaining his certificate, and that he is only entitled to charge his client as for an uncontested case.[12]

§ 49. **Attorney employed by one and paid by another.** One who is employed by the lender to examine and certify to the title of property offered as security for a contemplated loan to the borrower is responsible to the lender for the correctness of the certificate, although the cost of the certificate is paid by the borrower.[13] Where an attorney representing the mortgagor undertakes at the request of the mortgagee to see that the mortgage is a first lien, although the mortgagor is to pay the fees, he is bound to perform the duty with ordinary and reasonable skill and care in his profession, and on failure so to do he will be liable to the mortgagee for negligence in that re-

[10] Ehmer v. Title Co., 156 N. Y. 10; 50 N. E. Rep. 420 (1898); affirming 34 N. Y. Supp. 1132; 89 Hun 120 (1895).

[11] Schade v. Gehner, 133 Mo. 252; 34 S. W. Rep. 576 (1895). Rankin v. Schaeffer, 4 Mo. App. 108 (1877). See § 1.

[12] Page v. Trutch, 18 Fed. Cases, 995; 3 Cent. L. Jour. 559 (1876).

[13] Page v. Trutch, 18 Fed. Cases, 995; 3 Cent. L. Jour. 559 (1876).

spect.[14] In a case involving a similar proposition it was said: "The burden cast upon the mortgagor of paying for the services of the attorney selected by (the mortgagee) to guard his interests was simply a condition of the loan, and did not alter the status of such attorney or diminish the duty or responsibility which he owed to his employer."[15]

§ 50. **Liability to third persons.** One who issues a certificate of title is liable to the person who employed him, and he is not liable to a third person to whom his employer furnished the certificate for the purpose of selling the property or of procuring money thereon.[16] This is in accordance with the general rule that to constitute actionable negligence the person causing the injury must owe a duty to the person sustaining the loss.[17]

[14] Lawall v. Groman, 180 Pa. 532; 37 Atl. Rep. 98; 57 Am. St. Rep. 662 (1897).

[15] Wittenbrock v. Parker, 102 Cal. 93; 36 Pac. Rep. 374 (1894). See Scholes v. Brook, 63 Law Times (n. s.), 837; 64 Ibid. 674 (1891). Lawall v. Groman, 180 Pa. St. 532; 37 Atl. Rep. 98; 57 Am. St. Rep. 662 (1897). Donaldson v. Haldane, 7 C. & F. 762 (1837).

[16] Savings Bank v. Ward, 100 U. S. 195 (1879). Dundee Mtg. Co. v. Hughes, 20 Fed. Rep. 39 (1884). Bulkley v. Gray, 110 Cal. 339; 42 Pac. Rep. 900; 52 Am. St. Rep. 88 (1895). Fish v. Kelly, 17 C. B. (n. s.) 194 (1864).

[17] See § 18 et seq.

CHAPTER VI.

DUTY OF THE CUSTODIAN OF RECORDS.

§ 51. **Duty to watch searchers in his office.** The statutes of the different states provide that the county officers shall have custody of the records in their respective offices and that they shall keep them safely. These officers are required to give bonds for the faithful performance of their duties. It is evidently the purpose of the law to place on them the responsibility of correctly making and carefully preserving the public records committed to their care. Courts have been called on frequently to decide on the rights of members of the public to the use and inspection of the records in public offices, and they have taken occasion in some cases to lay down most conservative and even severe rules for the guidance of such officers in the care and custody of public records. In one case it was said: "A single stroke of the pen, the erasure or addition of a single word, may change the character of a conveyance or destroy the most valuable property right. The clerk is unfaithful to his trust if he allow one of the record books to remain for an instant in the hands of a stranger out of his sight. If he performs his whole duty he must watch or employ an assistant to watch each and every person who examines or abstracts a single title record."[1] And in another case it was said: "He is required to keep all books, papers and dockets belonging to his office with care and security. He cannot do this if any person may handle or inspect them otherwise than under his own eye. In our judgment any clerk would be guilty of a failure in his official duties should he permit any person, if only for a minute, though he might be familiar with the books and be able to examine them without the clerk's aid, to have custody of the books and papers of

[1] Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883). See also Belt v. Abstract Co., 73 Md. 289; 20 Atl. Rep. 982; 10 L. R. A. 212 (1890). Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 245 (1887).

his office. * * * No person has a right to examine or inspect the records of his office, except in his, the clerk's presence and under his observation. If he may do this for a minute, the clerk is not keeping them safely and securely. A blot or a scratch may be made in a minute that may alter a record; a leaf may be abstracted in a minute, and if one man may of right take a record book and abstract the contents—work a week upon it—any other man may do it."[2] To the great credit of the thousands of persons who have been custodians of public records it may be stated that no case is reported of an action against one of them for failure to keep the records safely. The rules laid down by courts have been stated incidentally and as a part of arguments in opinions in cases involving other issues. It is, of course, proper for judges to state in forcible language the revisory power which the courts have over the duty of public officers, but it must be remembered that such officers must exercise their judgment and act accordingly in concrete cases, and that it is only for an abuse of their discretion for which they may be called to account by the courts.

§ 52. **Discretion of custodian in management of office.** The custodian of public records has power to exercise a reasonable discretion in the care, management and government of his office, and in the preservation of the books and papers contained in it, and so far as that discretionary power extends, he is entitled to exercise it according to his best judgment to secure good order and the preservation of the records committed to his custody. To that extent, his powers and duties are not subject to be interfered with or controlled by the court. If, however, he exercises his power in such a manner as naturally to bring about injury to the records, he is liable to the state for the consequent damage, and if he exercises his power in conflict with the rights of the public, he is answerable in damages to the person injured,[3] or may be compelled by the writ of mandamus or injunction to act in conformity to law. It is for the officer to determine in each particular case whether he or one of his assistants shall stand beside one who is examining some records

[2] Buck v. Collins, 51 Ga. 393; 21 Am. Rep. 236 (1874).

[3] Brewer v. Watson, 65 Ala. 88 (1880); Brewer v. Watson, 71 Ala. 299; 46 Am. Rep. 318 (1882). O'Hara v. King, 52 Ill. 303 (1869).

or papers in his office. If he has reason to believe that the person making the examination contemplates the mutilation or abstraction of some part of the records, he will certainly be required to be vigilant; or if he knows that some paper or record is the subject of dispute or controversy, he will be held to a strict degree of care in the custody and preservation of it. He is required by the nature of his office to adopt a system in the use of books and papers, which will protect the public both in the preservation and inspection of them. The object of the system is the same in every public office, but the requirements of the system will vary with the number of rooms and volumes in the office and the number of persons who are accustomed to inspect the records. If a correct and adequate system is adopted and carried out from day to day, the custodian of the records will not be held liable for accidental or malicious injuries to them. If the rule were otherwise, no responsible or self-respecting person would accept the office.

§ 53. **Discretion of custodian continued.** A statute authorized the register of deeds to assign one or more suitable persons in his office to have the custody of the records during office hours, in whose presence, under the direction of the register, all examinations of the records should be made. It was held that the fact that the register permitted persons, other than those employed by the relator, an abstract company, to examine the records without being subject to the observation or surveillance of an assistant, did not prevent him from compelling the persons employed by the relator to make their examinations under such observation: and it was further held that the question as to whether or not additional custodians should be appointed was in a great measure confided to his judgment and discretion which when fairly exercised should not be controlled or overruled by the court.[4] In two cases[5] the question was whether an act, which declared that the records should be open to the inspection of any person for any lawful purpose, gave to an abstracter the right to make a tract index to the records, against the objection of the custodian, and the courts decided that it did not. Unfortunately the courts used such language

[4] People v. Reilly, 38 Hun 429 (1886).

[5] Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883). Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 255 (1887). See §§ 60, 76, 103.

in the opinions as to place the will and discretion of the officer above the express terms of the statute and to hold, in effect, that though the abstracter had the right under the statute, still the courts would not revise the discretion of the officer and compel him by mandamus to permit the exercise of the right. Such a doctrine unduly magnifies the discretion of the officer, which should be subject to the legislative power and to the revisory power of the courts. He must be granted power, control and discretion in the administration of his office, but it is going too far to say that courts will not enforce rights under a statute, merely because a ministerial officer has decided that no such rights exist and has objected to such use of the records as the petition in mandamus claims. When a member of the public appeals to the court to determine the rights of persons under the law to inspect or use the public records, and the officer in charge of the records is a party to the proceeding, it is proper for the court, in rendering its judgment or decree, to leave to the discretion of the officer all matters relating to the administrative conduct of the office and the detail and routine of his duties, but the substantive rights of the parties should be determined under the law, and not according to the will and wishes of the officer. These may be one thing under one officer and another thing under another officer, and they are not of the slightest weight or importance in determining legal questions in the courts of the land. Courts have full power to decide on questions of the rights and duties of county officers and to instruct them as to their duties, and they should not hesitate to do so. They should state in each case the rights of the petitioner and the duties of the officer, and should compel the officer to permit such use of the records as the petitioner is entitled to. The doctrine that an officer has any power over or control of records, which is beyond the power of the court to direct, or which is outside of its duty to revise, is repugnant to the theory of a state governed by laws which are administered by courts. It has been said that many opinions of courts on the subject of the right to inspect public records have tended to befog the whole subject.[6] Perhaps these cases, among others, were referred to. In Bean v. People,

[6] State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906). See § 85.

the court exercised its authority to deliver a lecture on the duty of the custodian to watch the records while under inspection by the public, but declined to exercise its authority to direct him as to the right of the petitioner to make an inspection. Such a direction has been given in all cases involving the right of inspection, except in the two cases under consideration. Sometimes it has been in favor of the petitioner and sometimes it has been against him, but the legal right of the petitioner has been passed on without reference to the control of the discretion and will of the officer by the writ of mandamus. After the supreme courts of Colorado and Kansas declined to revise the judgment and discretion of the county officers, the legislatures of those states passed acts which left them no judgment or discretion in such matters.[7]

When it is said that courts will not interfere with the discretion of an officer in the management of his office, it must be understood to mean that, within reasonable limits, the court will not control the manner in which he may manage and conduct the daily routine of his office. But this rule does not extend to the discretion which he may exercise in refusing or granting the use of public records to members of the public. The records are in his custody, but he holds them as trustee for the public. He may not give away the information contained in the records to persons who are not entitled to it, and he may not withhold such information from those who are entitled to it. He must act according to his best judgment in all matters in which the courts have not instructed him as to his duty, but his judgment as to the proper or improper use of such records under the law is subject to judicial regulation and control. In this sense it may be said that the public records are under the control of the officer and of the courts. Clerks of courts have asked for instructions as to their rights and duties concerning court records, and courts have instructed them on ex parte petitions.[8] An officer appointed by the court to restore certain records was instructed as to his rights on his ex parte petition.[9] But it is doubtful whether the court will entertain

[7] See §§ 60, 76, 103.

[8] In re Caswell, 18 R. I. 835; 27 L. R. A. 82; 29 Atl. Rep. 259; 49 Am. St. Rep. 814 (1893). In re Chambers, 44 Fed. Rep. 786 (1891).

[9] Ex parte Calhoun, 87 Ga. 359 (1891).

such a petition on behalf of a county officer not primarily subject to its orders, in the absence of express statutory authority. The rights of members of the public to the use of public property should be passed on by the courts on every proper occasion, and, where it can be avoided, they should not be left to the determination of a ministerial officer, who may be mulct in heavy damages for a wrong decision; and in all cases, when the officer is before the court and subject to its jurisdiction, the court should instruct him fully as to the rights claimed by the party or parties to the suit to use and inspect the records, and as to his duty in the premises. It has been the practice of courts to set forth the duties of the officer and the rights of the public concerning inspection of records, whether the rights claimed by the petitioner were sustained or denied.[10]

§ 54. **Discretion of custodian revised by courts.** An inspection of the public records and documents cannot be denied, merely because the person applying for it has been guilty of some past impropriety of conduct as to matters to which such writings may refer, or because it is apprehended that the information obtained will be employed in litigation against the state, county or municipality.[11]

§ 55. **Right of custodian to inquire into purpose of examination.** Where the general law prevails, which requires an interest in the records to support the right of inspection, or where the statutes declare that the records shall be open to the inspection of any person for any lawful purpose, it seems logical to hold that the officer in charge of records has the right to inquire into the purpose of an intended examination. Accordingly it has been held that an officer has such an interest in the records as entitles him to inquire into the purpose of a proposed examination and to refuse an inspection of them when in his best judgment such inspection is not warranted by law.[12] In considering

[10] Webber v. Townley, 43 Mich. 534; 5 N. W. Rep. 971; 38 Am. Rep. 213 (1880). State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906). Buck v. Collins, 51 Ga. 391; 21 Am. Rep. 236 (1874). Payne v. Staunton, 55 W. Va. 202; 46 S. E. Rep. 727 (1904). State v. McCubrey, 84 Minn. 439; 87 N. W. Rep. 1126 (1901). People v. Reilly, 38 Hun 429 (1886).

[11] Brewer v. Watson, 71 Ala. 299; 46 Am. Rep. 318 (1882). People v. Throop, 12 Wend. 183 (1834). See note to § 71.

[12] Payne v. Staunton, 55 W. Va. 202; 46 S. E. Rep. 727 (1904).

this subject it was said: "The clerk is the representative of the state, the custodian of and responsible for the safekeeping of the records, and has the clear right to determine the purpose for which inspection of such records is demanded. That right of determination becomes a duty, and he is bound to exercise it impartially. For any wilful or intentional misuse of the power he would be liable as for any other act of misconduct in office. The statutes clearly limit the right of inspection, and some person other than the person wishing to examine them must be clothed with authority to determine the purpose of an intended inspection. The clerk, as the custodian of the records, is the proper person to perform that duty."[13] But in a case where the right to search the judgment records was under consideration the court said: "If the clerk was entitled to the fee of 15 cents for each name searched for by the citizen, then he would have the right to compel the citizen to disclose the number of names he looked for, if not the names themselves. The law has not invested the clerk with any such inquisitional powers. To compel the citizen to disclose such facts might imperil important business interests, or injuriously affect the credit of the persons named."[14] It is rather fanciful to suggest that an examination for judgments against a person may imperil his business interests or injuriously affect his credit. The existence of judgments against him will undoubtedly be injurious, but the notation of the judgments by an examiner with the knowledge of the clerk who is supposed to have entered them on the records will not of itself tend to injure his credit or his interests. In this country there is a prevailing and perhaps an exaggerated hostility to official inquiry into the ordinary affairs of business, and this is shown even in judicial decisions, as in the cases just cited. But the power to determine whether one is entitled to examine the records must reside somewhere, and it is reasonable to hold that, in the first instance, it resides in the officer in

See Brewer v. Watson, 71 Ala. 299; 46 Am. Rep. 318 (1882).

[13] State v. McCubrey, 84 Minn. 439; 87 N. W. Rep. 1126 (1901).

[14] In re Chambers, 44 Fed. Rep. 786 (1891). See Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889). Hanson v. Eichstaedt, 69 Wis. 538; 35 N. W. Rep. 30 (1887). See also dissenting opinion in Payne v. Staunton, 55 W. Va. 202; 46 S. E. Rep. 727 (1904). Commonwealth v. Walton, 6 Pa. Dist. Rep. 287 (1895).

charge, subject to the revisory powers of the courts. The use and abuse of this power may safely be left to the discretion of the officers themselves, since they are subject to the courts in each instance where the courts are appealed to, and are answerable to the people for their general official conduct.

§ 56. **Reasonable rules and regulations.** The officer in charge of the public records and documents is the lawful custodian of them, and he is responsible for the preservation and safekeeping of them. The exercise of the right of access to them must be subject to the responsibilities and duties assumed by him on taking his official oath and giving his official bond. He has the power and it is his duty to prescribe such rules and regulations as will preserve them from loss and mutilation, but such rules and regulations should be general and reasonable and should be made with a view to the proper use of them by the public, rather than to his convenience and pleasure. They should be framed on the principle that the primary object of such records is to make a depository of information to be searched by all proper persons, and while providing amply for care and preservation, they should permit inspections to be made without unnecessary interference or delay. A rule established by the recorder and posted in conspicuous places in his office provided that persons desiring to examine the records of the office for the purpose of making abstracts would be permitted to do so on any day when the office was required to be kept open, between the hours of nine and twelve in the forenoon and one and four in the afternoon; provided that on days when the county commissioners were in session in the office, such examinations might be made only between the hours of nine and ten in the forenoon and four and five in the afternoon. The county clerk and recorder was under the law also the clerk of the board of county commissioners, and during a great part of his time was without an assistant in his office. It was held that under the circumstances the rule was reasonable.[15] The restriction of the number of employees of an abstract company to three persons in one of the divisions of the register's office on special work was held to be a reasonable regulation under the circumstances of

[15] Upton v. Catlin, 17 Colo. 546; 31 Pac. Rep. 172; 17 L. R. A. 282 (1892).

the case as disclosed by the record.[16] The powers of the custodian over the records are such as are necessary for their protection and preservation. To that end he may make and enforce proper regulations consistent with the right of the public to use them.[17] The statutes of some states provide that the person making a search of the public records and documents shall not use pen and ink in making memoranda and copies. Where there is no such provision in the law, it is proper for the custodian of the records to make it a rule of his office that memoranda and copies may be made only in pencil and that pen and ink shall not be used in abstracting the records.

§ 57. **Duty of custodian to lawyer or abstracter who is agent for one interested in the records.** Where there is no statute governing the right to examine public records, the general law on the subject is in force, and under the general law a person who is interested in them, presently or prospectively, is entitled to examine them to the full extent of his interest, subject to reasonable rules and regulations.[18] They are not kept for the convenience or gain of the officer in charge. They are public property designed by law for search by anyone who may be interested in them. Such a person may not only examine them in person, but he may also employ an agent to search them for him. He will naturally employ as his agent some one who has some special knowledge and experience in making searches, and will select a lawyer or an abstracter. From very early times in this country lawyers have been accustomed to examine public records in matters relating to the interests of their clients,[19] but in recent years the professional abstracter has superseded him, especially in the more populous counties. Almost all examinations of records are made by abstracters as agents of persons interested in current and pending transactions, and, as these transactions increase in number, the number of abstracters and their assistants will increase in performing the necessary work in the county

[16] People v. Richards, 99 N. Y. 620; 1 N. E. Rep. 258 (1885).

[17] Lum v. McCarthy, 39 N. J. L. 287 (1877).

[18] § 87 et seq.

[19] Newton v. Fisher, 98 N. C. 20; 3 S. E. Rep. 822 (1887). Buck v. Collins, 51 Ga. 391; 21 Am. Rep. 236 (1874). State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906). Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889).

offices. An abstracter and his assistants engaged in making searches for interested persons is not to be regarded as merely conducting his own business for hire. While he is conducting his business he is not dealing in any thing or commodity, but is merely making an examination and report on the state of the records, and for this purpose he is subrogated to the rights of his employers and is in the office in his representative capacity. If, as such agent, he is deprived of any rights, his principal may recover from the officer.[20] As the representatives of interested persons, abstracters are entitled to work in such numbers and with such facilities as are necessary to perform the work in which they are employed. It is the duty of the officer in charge to call upon the board of county commissioners, or other controlling authority, to supply ample room, desks, light, heat and assistants to accommodate all interested persons and their agents in making searches. It is his duty in a general way to do all in his power to enable interested persons and their agents to obtain all necessary and needful information contained in records which are constructive notice, and which they must search at their peril. On the other hand, it is his duty to establish such general rules as will protect the records and permit the due administration of the office, and to see that they are duly observed by all members of the public.[21]

§ 58. **Duty of custodian to abstracter making indices.** Where under statutory provisions an abstracter has the right of free inspection of the records, it is the duty of the custodian to permit such inspection, examination, taking of memoranda and copying of records as the abstracter may be entitled to, and to permit the work to be done by the abstracter and such a number of his employees as in the exercise of the custodian's unbiased judgment and discretion may be permitted at the same time to pursue their searches in his office, without interfering with his official duties and without depriving other persons equally entitled to make such searches of the convenient opportunity for so doing, and under the restrictions and regulations imposed by the law governing the duties of his custodianship.[22] The rights of an

[20] Lum v. McCarthy, 39 N. J. L. 287 (1877).

[21] Mechem on Offices and Officers, §§ 738, 739. See § 124.

[22] People v. Reilly, 38 Hun 429 (1886); High on Extraordinary Remedies, § 43.

abstracter of titles to access to the public records to enable him to make an index to them for use in his business do not depend on the privileges which the custodian may choose to permit others to enjoy, but they are measured by the law. They cannot be diminished for the benefit of others, nor can they be increased by reason of indulgence to others. And one whose business requires much examination has no greater rights than one whose interests require but little.[23] Where abstracters are entitled under the law to examine and copy the records, they should be treated by the custodian in an impartial way and as a part of the public. The fact that an abstracter of titles may use indiscriminately the information shown by the certificate of an officer, as a basis for making certificates of his own in the conduct of his business, does not concern the officer. A public officer has no such interest in the records intrusted to his care as will justify him in refusing to issue to an abstracter a certificate which the statute requires him to give to any person requesting it.[24]

§ 59. **Custodian's duty arises out of the nature of public records.** The conception of the duty of an officer to provide all necessary and proper facilities for an examination of the records in his office is not new. In 1843, in discussing the duties of a recorder, it was said: "All that a recorder is required to do in the premises, therefore, is to furnish facilities for an examination of the books in his office." [25] It is not the suggestion of interested persons who seek by means of it to reap some special advantage. It arises out of the nature of public records. The design in the establishment of such records is the formation of depositories of information, which may be searched by those who are interested or who are entitled under the statutes to search them, their agents and attorneys, and the right of such persons to enjoy proper facilities for searching them and taking extracts and copies from them is correlative to the duty of the officer in charge of them to furnish those facilities.[26]

§ 60. **Payment of money for privilege of making indices.** In

[23] Burton v. Reynolds, 102 Mich. 55; 60 N. W. Rep. 452 (1894). See also People v. Reilly, supra. Bell v. Title Co., 189 U. S. 131; 23 Sup. Ct. Rep. 569 (1900).

[24] State v. Scow, 93 Minn. 11; 100 N. W. Rep. 382 (1904). In re Chambers, 44 Fed. Rep. 786 (1891).

[25] Lusk v. Carlin, 5 Ill. 395 (1843).

[26] See § 84 et seq.

those states in which it is held that an abstracter may not enforce by mandamus his right to make an index to the records, under a statute giving the right of search to "any person,"[27] the custodian of the records and the abstracter are placed in a peculiar and embarrassing position. The officer may if he chooses recognize the abstracter as one of the general public and permit him to make the index, or he may deny that the abstracter has the right and effectually prevent him from making the index. This, in effect, confers upon a mere ministerial officer an arbitrary power over the use which may be made of the records, tends to produce bad feeling over the administration of the office and opens a way for improper influences over the officer in charge. Indeed it was said in one case: "There is no law to prevent the clerk aiding them (abstracters desiring to make an index to the records) if he chooses so to do, either gratis or for a stipulated compensation, provided he does not neglect his official duties. But the court should not, by mandamus, compel him to do so against his will."[28] It was, perhaps, this bald statement of the condition of the law, brought about by the effect of this decision, holding out a temptation to the officer to take compensation not provided for in the fee-bill, which induced the legislature at its next session to pass an act expressly giving abstracters the right to make tract indices and providing for a heavy penalty if the officer should refuse to permit an abstracter to make an index to the records. A contract between an abstract maker and an official custodian of public records whereby it is agreed that the abstracter may make a set of abstract books from the records, and that the officer will, so far as he can, exclude others from using the records for the purpose of making abstracts, and will use his influence to prevent and hinder the free use of the records, is a reprehensible compact, tending to the subversion of official duty and inviting official corruption.[29]

§ 61. **Reciprocal duties.** The custodian of public records has rights and duties which must be respected. Persons entitled to the use and inspection of public records also have rights and duties. They are subject to variation under conditions which arise from day to day in the conduct of the business of a public

[27] §§ 76, 103.

[28] Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883). See § 53.

[29] Parsons v. Randolph, 21 Mo. App. 353 (1886).

office. On every occasion, each and every one must act reasonably and with proper regard for the rights and duties of the others. As the circumstances vary, the conduct of each person must vary, so that the rule of reasonable action may be secured and the rights of each person may be respected.[30] If interested persons making searches, or an abstracter or the employees of an abstract company making searches in an office, are insolent to the custodian of the records, he has a right to exclude them from his office on that account. Persons who frequent public offices to make examinations and acquire information are required to conduct themselves in a civil and orderly manner.[31]

§ 62. **Limitations on the right of inspection.** From what has been said about the rights and duties of custodians of public records it is evident that even where the right of free inspection and examination of such records is given by statute to the public, there are certain restrictions on that right which must govern those who search them. The limitations of the right of inspection of public records and documents obviously are that the person making the search must obey the reasonable rules and regulations established by the custodian for the conduct of the business of the office and the preservation of the records; that he must conduct himself in a reasonable and orderly manner, and exercise his right at reasonable hours and times; that he must not obstruct the officer in charge and his assistants in the performance of their official duties, and that he must not interfere with the equal right of another person to such inspection and examination. He must not withhold the records from the officer or his assistants when they are needed for the performance of an official function, and he is not entitled to examine a record or document which is in use by the officer or an assistant, or by another searcher.[32]

§ 63. **Action for damages for refusal to permit inspection of records.** An action for damages lies against a ministerial officer

[30] Diamond Match Co. v. Powers, 51 Mich. 145; 16 N. W. Rep. 314 (1883).

[31] People v. Reilly, 38 Hun 429 (1886).

[32] Bell v. Title Company, 189 U. S. 131; 23 Sup. Ct. Rep. 569 (1900). Randolph v. State, 82 Ala. 527; 2 So. Rep. 714; 60 Am. Rep. 761 (1886); People v. Reilly, 38 Hun 429 (1886); Day v. Button, 96 Mich. 600; 56 N. W. Rep. 3 (1893); State v. McMillan, 49 Fla. 243; 38 So. Rep. 666 (1905).

having custody of public records, on account of his refusal to permit an interested person or his attorney to inspect the records. Nominal or compensatory damages may be recovered without proof of malice or an intent to injure on his part, but if it is alleged that the refusal on the part of the officer was malicious and with intent to injure the plaintiff, proof of such malice and intent is necessary to authorize a recovery of vindictive damages.[33] The good faith of the officer in refusing the inspection may relieve him from the imputation of malice and acquit him of liability for vindictive or exemplary damages, but it cannot relieve him of liability for actual or compensatory damages.[34] Where there is a right on one side to copies of the records and a corresponding duty imposed on the custodian of the records to furnish such copies, a refusal to perform such duty on the reasonable request of the party entitled to demand it, will subject the custodian to an action for damages. In such a case, the plaintiff is entitled to a verdict for nominal damages where he has shown a demand for the copies, with tender of fees, and a refusal to comply with the demand. The defendant, however, may show that the demand was not properly made, as for instance, that it was accompanied by insulting and vulgar language, or that the plaintiff was not entitled to such copies as he demanded.[35]

In view of the fact that a ministerial officer in charge of public records may be called upon at any time to pass on the rights of a member of the public to use and inspect such records under the general law or under the statutory laws of the state, and may be made to respond in compensatory damages for a wrong decision on those rights, it is apparent that it is the duty of the court, whenever a case involving the right to use and inspect such records is brought before it, to interpret the law carefully and fully for the guidance of such officer, and for the determination of the rights of the public to such use and inspection.

§ 64. **Damages for ejectment from a public office.** Every person has a right to enter and remain in a public office, such as

[33] Brewer v. Watson, 65 Ala. 88 (1880).

[34] Brewer v. Watson, 71 Ala. 299; 46 Am. Rep. 318 (1882). Action against officer, see Hunter v. Windsor, 24 Vt. 327 (1852). Lyman v. Edgarton, 29 Vt. 305 (1857).

[35] Boyden v. Burke, 14 How. (U. S.) 576 (1852).

the office of the clerk of a court, even from motives of curiosity merely, during such hours as the same may be open for the transaction of public business, so long as he conducts himself properly and in no way interferes with or impedes the business being transacted.[30]

[30] O'Hara v. King, 52 Ill. 303 (1869).

CHAPTER VII

MANDAMUS.

§ 65. **Proper remedy.** Where a person has been refused access to the public records, a petition for a peremptory writ of mandamus against the custodian of the records is a proper remedy. It is the usual remedy which has been resorted to in order to determine whether the right of access to the records exists. The writ of mandamus is not demandable as a matter of right, but is awarded in the discretion of the court. While it is true that in many cases the court will exercise discretion in granting the writ, it will not refuse it where the relator has a clear legal right, a substantial matter is involved and there is no other adequate remedy.

§ 66. **Clear legal right, free from doubt or exception.** In the absence of statutory provisions giving the right of access to the records, it has been uniformly held that the relator must show some interest, present or prospective, in the particular records which he desires to examine. But the necessity of interest has been done away with by the statutes of the federal government and of many states, and in these jurisdictions no special interest in the records need be averred in the petition or shown at the trial. Where three employees of a title company were permitted to work on certain records in one of the departments of the office of the register of deeds, and he objected to the bringing in of a fourth man, on the ground that it would seriously interfere with the current business of that department, the trial court denied a peremptory writ, and on appeal it was held that relator's right to have greater facilities and privileges in the department was not so clear that the appellate court would reverse the decision of the court below in denying it.[1] An abstract maker filed a petition to compel the county clerk to permit an inspection of the files in his office. In the petition he stated that he was engaged

[1] People v. Richards, 99 N. Y. 620; 1 N. E. Rep. 258 (1885).

in the business of making abstracts of title to land, and was employed to make an abstract of certain premises, and that—"in order to properly complete his work, it became necessary to see and copy the proceedings in file No. 14,082 in the circuit court for the county of Wayne, in chancery, being a suit brought by William Shattuck and others against James C. McCormick for the purpose of enforcing specific performance of a land contract, * * * and that the respondent, the county clerk, refused to allow him to inspect and copy said file." The petition prayed that respondent be compelled by mandamus to permit the relator to "inspect, examine and copy from file No. 14,082, and from any and all other files in his office." The court, in passing on the questions involved, said: "The law provides for recording the evidences of title to land in the register's office, and all that is recorded therein is constructive notice to all persons. Taxes and proceedings on the part of the public must be taken notice of by all interested, though the register's office is not the place where the records pertaining thereto are to be found. In several cases we have intimated that the general public might have a right, under proper restrictions, to the information contained in public offices upon these subjects. * * * We do not find it necessary in this case to go so far as to say that one interested in the land title, where he has notice of the pendency of proceedings affecting such title, either actual or constructive, by reason of the filing of lis pendens or other papers constituting such notice, shall not be allowed, either personally or by proper representative, e. g., an attorney of the court, to inspect, and make necessary memoranda for his use. Such right might seem necessary and to be contemplated by the law which subjects him to the consequences of notice. When such case shall arise, it will receive consideration. The record in this case shows nothing of the kind. On the contrary, relator's petition negatives constructive notice, and does not assert actual notice. It does not state that the suit involves, or is in any way connected with, the land that relator was employed to abstract, by way of contract or otherwise, or that it is necessary to the interests of his employer that he be allowed to inspect this record. It does state that, 'in order to properly complete his work, it became necessary to see and copy the proceedings'; and whatever may be meant

by that, it falls short of stating a necessity that shows a legal right to inspect the record."[2]

§ 67. **Clear legal right, continued.** Patent indices to judgment dockets kept by the clerk, paid for out of public funds, not required by law to be kept, which may be discontinued at any time without violence to the clerk's official bond, are in a sense public records, but mandamus will not lie to compel the clerk to permit such indices to be used in making searches by the public, when there are separate indices to each judgment docket. In such a case no such clear legal right of the relator has been violated by the refusal of the use of them as will be enforced by mandamus.[3] Mandamus will not lie to compel a county clerk, who, for a compensation paid by relator's competitors, employs a clerk at his own expense to superintend their use of the files and records in the office for the purpose of making abstracts of title, to grant the same facilities to the relator without compensation, it appearing that the clerk is not legally bound to furnish such increased facilities and that the furnishing of them to his competitors does not abridge the rights to which the relator is legally entitled.[4]

§ 68. **Suppression of files under order of court.** Parties to a suit in court, under the direction of the court, may lawfully withhold and suppress the records and papers in the case, and may prevent any statement in regard to it being made public until they are made public by the consent of the parties or by proceedings in open court. Where the sole object of the relator is to obtain for publication information concerning a suit which has just been commenced and which the parties have obtained from the court permission to suppress for the time being, the discretionary writ of mandamus will not be granted, even though the relator has a strict legal right to the information sought.[5]

[2] Burton v. Reynolds, 110 Mich. 354; 68 N. W. Rep. 217 (1896). See Diamond Match Co. v. Powers, 51 Mich. 145; 16 N. W. Rep. 314 (1883).

[3] Fidelity Trust Co. v. Clerk, 65 N. J. L. 495; 47 Atl. Rep. 451 (1900). See State v. Reed, 36 Wash. 638; 79 Pac. Rep. 306 (1905).

[4] Burton v. Reynolds, 102 Mich. 55; 60 N. W. Rep. 452 (1894).

[5] Schmedding v. May, 85 Mich. 1; 48 N. W. Rep. 201 (1891). See Park v. Free Press Co., 72 Mich. 560; 40 N. W. Rep. 73 (1888).

§ 69. **Clear legal right, proper foundation for action.** In order to entitle a person to resort to the court by petition for a writ of mandamus to compel the custodian of public records to permit him to inspect them, he must show that he has made a proper demand for such inspection, at a proper time and place and for a proper purpose. The demand should be made during office hours at the office of the custodian. It is at such a time and place that the custodian is acting in his official capacity, and it is then and there his duty either to grant or to deny the request. It should be made in a respectful manner. A demand for inspection or copies of public records, accompanied with personal insult or vulgar abuse of the officer, is not a legal demand.[6] Where the statute does not give the right of free access to all the public records, documents and files in the office, the demand must be for the examination of specific records. A demand on an officer in charge of public records by a private citizen to be permitted to examine "any and all books of public records in the office which he may desire to examine, or which

Cowley v. Pulsifer, 137 Mass. 392 (1884).

[6] Boyden v. Burke, 14 How. (U. S.) 576 (1852). In this case it was said: "A party entitled to the services of a public officer must request them in a proper manner. He has no right to accompany his demand for copies or inspection of the records with personal insult or vulgar abuse of the officer. Those to whom the people have committed a high trust are entitled at least to common courtesy and are not bound to submit to the insolence or ill temper of those who disregard the decencies of social intercourse. A demand accompanied with rudeness and insult is not a legal demand. But where a person has made a demand for copies or for inspection of records in such an insulting manner as to take it out of the category of legal demands, he may, a little later, make a demand in a proper manner and unaccompanied with any insulting language. If the second or later demand is made in a proper manner, the officer is not justified in refusing it on account of the former misconduct of the demandant, or for the purpose of enforcing an apology by withholding the rights of the demandant. Ill manners or bad temper do not work a forfeiture of a man's civil rights. While want of an apology for his previous rudeness and insult might well justify the officer in refusing all social intercourse with the demandant, yet it could not release him from the obligations imposed upon him by his official station. In such a case the want of an apology does not take away rights which are given by the laws of the land." See also Brewer v. Watson, 71 Ala. 299; 46 Am. Rep. 318 (1882).

his business, duty or interest may require," is too general to be the basis for a writ of mandamus against the officer.[7]

§ 70. **Purpose of examination.** Undoubtedly the right to inspect the records is controlled to some extent by the object for which the examination is to be made and the use to be made of the information. It has therefore been held that the officer in charge of the public records has such an interest as entitles him to inquire into the purpose of the proposed examination and to refuse an inspection of them when in his best judgment such inspection is not warranted by law.[8] It has also been held that in the absence of statutory provisions giving the right of free inspection to any person, or when the statutes limit the right of inspection, the officer in charge, as custodian of the records, is the proper person to determine, in the first instance, the lawfulness of the purpose of an intended inspection.[9] But the right of the officer to inquire into the purpose of the examination, when a request or demand is made on him for inspection of the records, has been very forcibly denied.[10] Whether the custodian has this right or not, it is certain that the court will not grant the writ of mandamus to the relator unless the record discloses that the demand for inspection was made for a proper purpose. To entitle him to the aid of the court he must show that he desires an inspection for a proper purpose. It is frequently said in the opinions of courts that the writ will not be granted for a useless purpose or merely to enable a person to gratify a whim, a fancy, spite or an idle curiosity in searching the records, and, indeed, it is difficult to imagine that any such purpose can constitute a basis for any kind of an action.

§ 71. **Court will pass on purpose of examination.** On an application for a writ of mandamus, where a demand on the officer and a refusal by him has been shown, the court will pass on

[7] State v. Reed, 36 Wash. 638; 79 Pac. Rep. 306 (1905). See People v. Walker, 9 Mich. 328 (1861).

[8] Payne v. Staunton, 55 W. Va. 202; 46 S. E. Rep. 727 (1904). See Brewer v. Watson, 71 Ala. 299; 46 Am. Rep. 318 (1882). See § 56.

[9] State v. McCubrey, 84 Minn. 439; 87 N. W. Rep. 1126 (1901).

[10] Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889). In re Chambers, 44 Fed. Rep. 786 (1891). Hanson v. Eichstaedt, 69 Wis. 538; 35 N. W. Rep. 30 (1887). See dissenting opinion in Payne v. Staunton, 55 W. Va. 202; 46 S. E. Rep. 727 (1904). Commonwealth v. Walton, 6 Pa. Dist. Rep. 287 (1895).

the lawfulnesss of the purpose of the intended examination. While the person seeking inspection is not bound by the decision of the officer on the question of the lawfulness of the purpose of the proposed examination, but may petition the court to revise his decision, it is safe for him to state such purpose broadly and fully when a demand is made as a basis for a petition for a writ of mandamus, in order that he may come before the court with as clear a legal right as possible. When mandamus is asked to compel the inspection of records, under the strict law governing the writ the relator must have a legitimate use for the inspection in order to show a clear legal right. It is not a proper purpose to seek to examine the records in order to publish broadcast the details of a divorce suit, or to gratify a private spite, or to promote public scandal.[11] Where the right of inspection is not given by statute, a demand for the privilege of taking memoranda from the records for future use in the business of abstract making is not considered for a proper purpose.[12] An inspection of the public records and documents may not be denied merely because it is apprehended that the information obtained will be employed in litigation against the state, county or municipality.[13] Such inspection may not be denied because of the political hostility of the applicant to the officer in charge of the records.[14] The fact that an abstracter of title may use indiscriminately the information shown by the certificate of an officer, as a basis for making certificates of his own in the conduct of his business, does not concern the officer. A public officer has no such interest in the records intrusted to his care as will justify him in refusing to issue to an abstracter a certificate which the statute requires him to give to any person requesting it.[15]

§ 72. **A substantial matter involved.** After the relator has clearly established his right to inspect the records, he must show that some substantial matter is involved in the controversy.

[11] In re Caswell, 18 R. I. 835; 29 Atl. Rep. 259; 49 Am. St. Rep. 814; 27 L. R. A. 82 (1893).

[12] See § 87.

[13] People v. Throop, 12 Wend. 183 (1834). Brewer v. Watson, 71 Ala. 299; 46 Am. Rep. 318 (1882).

[14] State v. Williams, 110 Tenn. 549; 75 S. W. Rep. 948 (1903).

[15] State v. Seow, 93 Minn. 11; 100 N. W. Rep. 382 (1904). In re Chambers, 44 Fed. Rep. 786 (1891).

We have just seen that the court will not aid him to enable him to gratify an idle curiosity or a personal spite, to promote a public scandal or to publish matter which tends to demoralize and corrupt the public taste. It is, however, sufficient for him to show that the public records and documents contain information which he is interested to know as affecting his property rights or the conduct of his business. But it is not essential that he show so personal and private an interest. It is not necessary that the interests of the person seeking inspection shall be private, capable of sustaining a suit or defence on his own personal behalf. It will justify his demand for inspection if he is acting in the suit as a representative of the common or public right. The court will act by mandamus at the instance of a private person for the redress of a public wrong by a public officer whose official sphere is confined to some political division of the state, whenever the applicant is one of the class of persons to be most directly affected in the enjoyment of the public right, and when the public convenience will be subserved by the remedy desired.[16] Where one is insisting on a public right and is petitioning for a writ of mandamus to procure the enforcement of a public duty, he need not show that he has a private or special interest in the result. It is sufficient to show that he is a citizen and, as such, is interested in the execution of the laws. In such a case the people are to be regarded as the real party in interest.[17]

§ 73. **No other adequate remedy.** The courts have not discussed the sufficiency of the ordinary legal remedies to which relators in mandamus suits might have resorted in order to obtain their legal rights to inspect and examine public records, but they have assumed that mandamus is the proper proceeding where the right is clear and a substantial matter is in controversy.[18] It is well established that mandamus is the proper proceeding to compel a ministerial officer to perform his duty, and it is manifest that it is a direct proceeding against a custodian of the public records, which goes at once into the merits of the dispute and establishes the rights of the parties without delay. It is more just and fair to a public officer than a suit

[16] State v. Williams, 41 N. J. L. 332 (1879); 20 Am. & Eng. Ency. Law, 522, 523.

[17] High Extr. Rem., § 431; Merrill on Mandamus, § 230.

[18] See Brewer v. Watson, 61 Ala. 312 (1878).

for damages. Where the object is to enforce obedience to a public law, the writ of mandamus is the direct proceeding and is demandable of right.[19]

§ 74. **Petition for mandamus by an abstracter.** It has been questioned whether mandamus is the proper remedy for an abstracter to compel the recorder to permit him to prepare a set of abstract books from the public records. The remedy by mandamus contemplates the necessity of indicating the precise thing to be done, and its adaptation to cases calling for continuous action, varying according to circumstances, has been doubted. It has, therefore, been suggested that where a claim is for a continuous use of the recorder's office and its public contents, from day to day and week to week, in preparing a set of private abstract books, and not merely for a single occasion with all its material facts defined, there must be great, if not insuperable difficulty in enforcing the claim by mandamus.[20] It has also been suggested that the proper province of a writ of mandamus is to enjoin the doing of particular acts, and not to constrain a person to regulate his whole course of conduct according to some general principle.[21] But in almost all the cases in which persons have resorted to the courts to obtain access to the records they have done so by petition for a writ of mandamus, and in only two or three cases is there any comment on the remedial rights of the parties. So uniform has been the practice of the courts of the different states to pass on the substantive rights of the parties under this form of action, that it may be confidently laid down as the proper remedy in such cases, whether the relator be a person demanding his rights in some particular matter, or one desiring to use the records contin-

[19] High Extr. Rem., § 9; 1 Greenleaf, Ev., §§ 471, 478. Stockman v. Brooks, 17 Colo. 248; 29 Pac. Rep. 146 (1892). No adequate remedy at law; mandamus. See Clement v. Graham, 78 Vt. 290; 63 Atl. Rep. 146 (1906). People v. Hilliard, 29 Ill. 413 (1862). Chumasero v. Potts, 2 Mont. 242 (1875). State v. Company, 10 Tex. Civ. App. 12; 30 S. W. Rep. 266 (1895). Territory v. Shearer, 2 Dak. 332; 8 N. W. Rep. 135 (1880). Rader v. Committee, 43 N. J. L. 518 (1881). Commonwealth v. Common Council, 34 Pa. (10 Casey) 496 (1859).

[20] Diamond Match Co. v. Powers, 51 Mich. 145; 16 N. W. Rep. 314 (1883), explained in Burton v. Tuite, 78 Mich. 363.

[21] Barber v. Title Guaranty Co., 53 N. J. Eq. 158; 32 Atl. Rep. 222 (1895).

uously in the conduct of his business. In some cases the writ of injunction has been prayed for to restrain the officer from interfering with the lawful access of the complainant to the public records. The judgment or decree of the court is substantially the same in each proceeding. Where relief is granted to the relator in a petition for a writ of mandamus, the mandate of the court is that he be permitted to have access to the records under such reasonable rules and regulations as may be prescribed by the officer, and where relief is given to the complainant on his bill for an injunction, the decree of the court is mandatory in its nature and commands the officer to cease to interfere with the rights of the complainant and to permit him to have access to the records under reasonable rules and regulations to be fixed by the officer.

§ 75. **Proper mandate of the court.** It is a mistake to suppose that it is necessary or even proper in the mandate of the court to lay down the general principles which shall regulate the whole course of conduct of the official custodian of the records. By reason of his statutory duty to care for and preserve the records, he is clothed with a ministerial discretion in the conduct of his office, and the court will not only not interfere so long as he exercises it fairly, but it will not, in advance of his action, prescribe how he shall conduct his official duties. It will presume that he will do his duty when the right of the relator to have access to the records has been established. In one case it was said: "We do not feel called upon to specify the number of persons that respondent must accommodate, or to prescribe the rules which he may require relator to observe. These should be made with reference to the circumstances and with a view to the reasonable use by relator of books and office. We assume that, the question of the right to use the same being settled, the parties can adjust their differences."[22] The peremptory writ on the petition of an abstracter of titles should merely require the officer to permit such inspection, examination, taking of memoranda and copying of records as the relator may be entitled to, and to permit the work to be done by the abstracter and such a number of his employees as in the exercise of his unbiased judgment and discretion may be permitted at the same time to pur-

[22] Day v. Button, 96 Mich. 600; 56 N. W. Rep. 3 (1893).

sue their searches in his office without interfering with his official duties, and without depriving other persons equally entitled to make such searches of the convenient opportunity for so doing, and under the restrictions and regulations imposed by the law governing the duties of his custodianship.[23] In one case the trial court submitted to the jury the number of assistants which the abstract maker should be permitted to have in the office of the recorder, and entered judgment commanding the recorder to permit the abstracter to have in the recorder's office the number of employees which the jury had found could conveniently be accommodated there during office hours to inspect and make memoranda and copies of the records of the office, including papers filed but not recorded, and to permit the abstracter to have an extra assistant for the space of one hour during each day to compare notes and memoranda with the records. On appeal to the supreme court a modification of this judgment was ordered to provide that the abstracter and the designated number of employees might occupy the office during such hours as might be specified reasonably and generally by the recorder.[24]

§ 76. **Discretionary writ versus statutory right.** Where the statute of a state provides that the public records shall be open for examination by any person for any lawful purpose, it usually has been held that the statute literally means what it actually says.[25] But in two cases it was held that a recorder may not be compelled by mandamus to permit an abstracter to use his office and the county records for the purpose of making a tract index to the records, even though the statutes contain such a provision.[26] The argument was that such a statute did not give to the abstracter a clear legal right to take memoranda of the whole of the records in the office for future use in his business, and that the discretionary writ of mandamus should be denied if the recorder was opposed to the prosecution of the work in his office by the abstracter. It has been suggested that such a construction confers on the the county

[23] People v. Reilly, 38 Hun 429 (1886); High on Extraordinary Remedies, § 43.

[24] Upton v. Catlin, 17 Colo. 546; 31 Pac. Rep. 172; 17 L. R. A. 282 (1892).

[25] See § 114 et seq.

[26] Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883). Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 255 (1887).

officer too great power and discretion in view of the express language used in the statute,[27] and that it opens a way for improper influences and inducements in the conduct of the office.[28] It may also be suggested that it places a member of the public at an unfair disadvantage when he seeks to determine his rights under such a statute. When he has been denied the right of inspection and appeals to the court, urges the purposes and design of the public records, and presents the statutory law under which he claims, he is met with technical objections of a serious character before his substantive rights may be passed on. He is told that the writ which he prays for is not demandable of right, but is discretionary, and that he is seeking to override the will and the objection of a public officer, who has the power to act in one way or in just the opposite way, according to his wish. He is then told that while he comes within the terms of the statute, the court, in the exercise of its discretion, will not enforce his rights against the will of the county officer. Such a process of construction of a statute is highly technical and has not found general favor with the courts or with the legislatures.[29] A statute conferring on members of the public personal rights in the use of public property, which are to be exercised for the convenience and security of the public as well as for private gain, should be considered broadly and liberally, and should not be modified or controlled by general principles regulating a remedial writ issued out of courts, or conferring discretion on an officer in the administration of his office. Where the object is to enforce obedience to a public law, the writ of mandamus is the direct proceeding and is demandable of right.[30]

[27] § 53. [28] § 60. [29] §§ 60, 103.

[30] High Extr. Rem., § 9. 1 Greenleaf Ev., §§ 471, 478. Stocknan v. Brooks, 17 Colo. 248; 29 Pac. Rep. 146 (1892).

CHAPTER VIII.

PUBLIC RECORDS, GENERAL RIGHT OF INSPECTION.

§ 77. **Nature of public records.** A public record is "a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done."[1] The officer must have authority to make the record, but the authority need not be derived from express statutory enactment. Whenever a written record of the transaction of a public officer in his office is a convenient mode of discharging the duties of his office, it is not only his right but his duty to keep the memorial, whether expressly required so to do or not. When the record is kept, it becomes a public document—a public record belonging to the office and not to the officer, and it is the property of the state and not of the citizen. It is in no sense a private memorandum.[2] A book kept by a person in public office, in which he is required, whether by statute or by the nature of his office, to write down particular transactions occurring in the course of his public duties under his personal observation, is a public document.[3] To entitle a book to the character of an official document it is not necessary that an express statute shall require it to be kept or that the nature of the office should render the keeping of it indispensable. It is sufficient that it be kept by proper authority.[4] Such a book is a public document because the entries in it are of public interest and notoriety, and because they are made under the sanction of an oath of office, or at least under that of official duty.[5]

These are, of course, broad and general principles of law. In fact, they are so broad and general that they have been rarely applied to books and documents in offices controlled by the re-

[1] Bouvier Law Dict., Vol. 2, p. 424.

[2] 24 Am. & Eng. Ency. Law (2nd Ed.), 170; Coleman v. Commonwealth, 25 Gratt. 881; 18 Am. Rep. 711 (1874); Clay v. Ballard, 87 Va. 787; 13 S. E. Rep. 262 (1891).

[3] 1 Greenleaf's Ev., § 483.

[4] 1 Greenleaf's Ev., § 496.

[5] 1 Greenleaf's Ev., § 484.

cording acts. They have been governing principles in determining whether or not books, documents and entries in the executive and legislative departments were public records.[6]

§ 78. **Application of general principles.** Stub receipt books in a city treasurer's office, which contain the record of canceled certificates of tax sales, the list of lots redeemed from sales for special city taxes, and also the list of lots sold to the city for delinquent taxes and afterward assigned to individuals, are public records within the meaning of an act giving access to public records to all persons for any lawful purpose, notwithstanding the fact that all data contained in such books are at the convenience of the treasurer entered in record books which are accessible to the public.[7] In the absence of any provision of the statutes for access by the public to the records of judgments of the courts, any person interested has a right to examine those records. They are no less open to the public by reason of the absence of a provision declaring the right.[8] Prior to the year 1897 the clerk of the supreme court received to his own use all the fees derived from furnishing searches for judgments in his office. In that year the clerk was placed on a salary in lieu of all fees, and the gross income of the office was turned into the state treasury. There was at the time in the office a system of indexing judgments called the patent or short form, which differed from the old method of appending a separate index to each book of records, although the older method was still kept up. The patent indices enabled a search to be made more quickly. The cost of keeping up both forms of indices since 1897 had been paid out of the state treasury. In January, 1900, a demand was made on the clerk by an attorney of a company, lawfully engaged in the business of title insurance, for

[6] 20 Am. & Eng. Ency. Law, 505, 508, 521, 523. 24 Am. & Eng. Ency. Law (2nd Ed.), 169, 183, 184.

[7] Burton v. Tuite, 80 Mich. 218; 45 N. W. Rep. 88; 7 L. R. A. 824 (1889). Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889). See Aitcheson v. Huebner, 90 Mich. 643; 51 N. W. Rep. 634 (1892). Bell v. Title Co., 189 U. S. 131; 23 Sup. Ct. Rep. 569 (1900). Brewer v. Watson, 61 Ala. 310 (1878). Brewer v. Watson, 65 Ala. 88 (1880). Clement v. Graham, 78 Vt. 290; 63 Atl. Rep. 146 (1906). Phelan v. State, 76 Ala. 49 (1884).

[8] Lum v. McCarty, 39 N. J. L. 287 (1877), overruling Fleming v. Hudson, 30 N. J. L. 280.

permission to examine the patent indices. On a petition for a writ of mandamus it was held that the public did not necessarily have the right to use a thing because it was paid for out of public funds, and that no clear legal right of the relator had been violated by the refusal of permission to use the patent indices.[9] Special findings of facts were taken to the appellate court, but the evidence on which the facts were found was not in the record. The court below found that there was no statute requiring the county treasurer to keep a record of certificates of redemption of land from tax sales, but that such records were kept by him for his own convenience, though at public expense, and held that they were not public records open to inspection as a matter of right. There being nothing in the record to show that the expenditure for keeping up the records was proper and authorized by law, the appellate court refused to disturb the finding of the court below.[10] A written direction by the attorney of a judgment plaintiff, giving instructions to a sheriff as to the enforcement of an execution, is not a public record, open for public inspection.[11]

§ 79. **Are some records more public than others?** In speaking generally of public records it has been urged that all kinds of public records may not be equally public and open to general inspection. In a very well considered case in which the right of inspection is treated of at great length it is said: "The filing and recording of documents relating to private title is at private expense, and, although the records regarding them are public, they may not be considered so in that broad sense in which books and entries relating to elections, revenues, fees and the acts and conduct of officials of more general concern or interest, are considered public."[12] The proposition as stated has a plausible sound, but it may not bear close analysis. If the payment of the recording fee is the controlling factor which makes the record of a conveyance less public than some other records, we must place in the same category the record and decision of a private suit between private persons who pay

[9] Fidelity Trust Co. v. Clerk, 65 N. J. L. 495; 47 Atl. Rep. 451 (1900).

[10] State v. Reed, 36 Wash. 638; 79 Pac. Rep. 306 (1905).

[11] Whelan v. San Francisco, 114 Cal. 548; 46 Pac. Rep. 468 (1896).

[12] State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906).

the fees and costs of the litigation. But we know that the decisions in cases between private persons are published under official sanction as well as by private enterprise, and that the books and papers containing them are sold to any person who may wish to buy them. Such decisions are held to contain the law of the land pertaining to private property, and they are of public interest for that reason. They often pass on questions of private titles to land, and when such is the case they give them wide publicity. A contention between two private persons may be considered as a private matter, but a lawsuit between private persons, which is lis pendens,—notice to everyone of the rights claimed under it,—is in a very restricted sense a matter of private concern. A deed to lands may be a document "relating to private titles." It certainly is the private property of the grantee, and he has dominion over it. While under our laws the recording of conveyances and the records of conveyances are of primary importance, a man may keep his deed off the records of the recorder's office if he wishes. He merely does so at his peril. After the deed has been filed for record it may still be considered as a document "relating to private titles," for no new force or effect is given to a deed by the act of recording it. But the filing and record of the deed in the recorder's office is an entirely different matter. The recorder's office is the depository of information on titles to real estate in the county in which it is situated, and its records are proclamations and declarations by the grantees of the conveyances and are constructive notice to all the world of the contents of them. When the grantee in a deed places it on record he does more than to have it transcribed; he causes a record of it to be made, by which he gives notice to the public of his rights under it, and he makes this record public in the broadest possible sense. The effect which the law gives to the record of the instrument is the controlling force which makes it a public record in the most comprehensive sense. The fact that he pays a fee for the clerical work of spreading it on the records is a mere incident. The legislature of the state has entire control of the records in the recorder's office, and it can give to any person free access to them. One who has paid the fees for transcribing a deed will not be heard to complain of any act of the legislature giving free access to the records. With reference to the last part of

the quotation under discussion, it is only necessary to say that most persons are engaged in pursuit of property, and that under our system of holding titles to real estate the public records of conveyances are possibly of as much "general concern or interest" as the "books and entries relating to elections, revenues, fees and the acts and conduct of officials."

§ 80. **Comparative needs of inspection of public records.** In a recent case[13] where the right to inspect public records was treated of exhaustively, it was said: "As regards the needs of inspection, records may be divided into four or more classes. It is most important to have free examination and speedy publication of the statutes and decisions which make the law by which the people are governed, and by which they are charged with notice in their conduct. It is also essential to the public welfare that records relating to revenues, elections, fees and official acts generally be open to inspection. Access to the files and copies of documents relating to titles to property by persons who have, or are about to acquire, an interest is necessary for their protection. Proceedings in civil suits are sometimes of such a scandalous nature that closed doors are justified and publicity is better suppressed."

There is perhaps a suggestion in the language just quoted that there is a comparative need of inspection of public records, and that the need is different in each of four or more classes. That there are four or more distinct classes of public records is very evident. Legislative enactments differ from decisions of courts, and both these differ from records relating to revenues, elections, fees and official acts. All these in turn differ from records relating to titles to real estate. But it does not follow necessarily that there is any comparative need of inspection of these different records. The cases holding that persons have a right to publish statutes and court decisions as a matter of private enterprise are not placed on any broad or fundamental ground, indicating that there is primary need that the public be informed as speedily as possible of the laws governing their rights and duties. They are controlled by the provisions of statutes which were the subject of judicial construction in these

[13] State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906).

cases.[14] There is no broad uniform doctrine to the effect that the public may freely and as a matter of right inspect records relating to revenues, fees, elections and official acts. On the contrary, it has been held repeatedly that an applicant who desires to inspect such records must show that the purpose of the inspection is to vindicate some private or public right; and where his right has been upheld, it has been shown that the applicant was within the rule.[15] So far as the decisions of courts have gone, independent of legislative enactment, they have placed the need of inspection of records relating to titles to real estate on the same basis as the needs of inspection of other public records, and where legislatures have sought to regulate the inspection of public records, they usually have done so in general terms applying alike to all kinds of records. This is as it should be. The records of title to real estate include the records of taxes and special assessments. The institution of private property is one of the two great pillars of our civilization, and anything which is as fundamental to the enjoyment of the ownership of real estate as are the records of conveyances under our recording acts, making such records constructive notice of the contents of them to all the world, is of the utmost public importance. Our system of revenues, fees and official conduct is based on the right of private property, and it would be strange if the records of these things should be more open to inspection than the records of the most stable form of private property. The records of revenues, fees, elections and official acts are seldom examined, except as to taxes and special assessments on real estate, while the records of titles to real estate are daily examined by hundreds of persons. The need of inspection of such records is continuous and general, and it can-

[14] Nash v. Lathrop, 142 Mass. 29; 6 N. E. Rep. 559; (1886). Banks v. West Pub. Co., 27 Fed. Rep. 50 (1886).

[15] State v. Williams, 41 N. J. L. 332; 32 Am. Rep. 219 (1879). Payne v. Staunton, 55 W. Va. 202; 46 S. E. Rep. 727 (1904). State v. Hoblitzelle, 85 Mo. 620 (1885). State v. Cummins, 76 Iowa 133; 40 N. W. Rep. 124 (1886). State v. Donovan, 10 N. Dak. 209; 86 N. W. Rep. 709 (1901). State v. King, 154 Ind. 621; 57 N. E. Rep. 535 (1900). Marsh v. Sanders, 110 La. 726; 34 So. Rep. 752 (1903). Clay v. Ballard, 87 Va. 787; 13 S. E. Rep. 262 (1891). Brown v. County Treasurer, 54 Mich. 132; 19 N. W. Rep. 778; 52 Am. Rep. 800 (1884).

not be said justly that it is in any manner subordinate to the need of inspection of any other class of records.

§ 81. **No distinction between public records in this country.** There is said to be a distinction under the English law between public records generally and judicial records; every subject who is interested in judicial records may examine them, but he does not necessarily have the right to examine other public records.[16] But in this country all public records, whether legislative, executive or judicial, are governed by the same rules of inspection, unless the statutes of the state have made a distinction between them.[17]

§ 82. **Instruments filed but not recorded are public records.** Where the statute makes an instrument notice to all the world of the contents of it from the time it is filed for record in the office and before it is actually spread of record, it is open to examination as soon as filed, just as records generally are, and subject to the same limitations.[18]

§ 83. **What is included in right of inspection.** The right to inspect and examine public records includes the right to make extracts and memoranda from them and to copy them. One who has the right to inspect public records may make an abstract of them, or may copy them at length.[19] But it has been held that this rule applies only to such records as are constructive notice of the contents of them, and that the right under a statute to inspect, take memoranda or make an abstract

[16] 1 Greenleaf on Ev., §§ 471–475. 1 Tidd's Practice, 593. 3 Taylor's Ev. (Chamberlayne Ed.), §§ 1480–1483. Wharton, Ev. (3rd Ed.), §§ 745–747.

[17] In re Caswell, 18 R. I. 835; 29 Atl. Rep. 259; 49 Am. St. Rep. 814; 27 L. R. A. 82 (1893).

[18] State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906). Upton v. Catlin, 17 Colo. 546; 31 Pac. Rep. 172; 17 L. R. A. 282 (1892). Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883).

[19] Randolph v. State, 82 Ala. 527; 2 So. Rep. 714; 60 Am. Rep. 761 (1886). Boylan v. Warren, 39 Kan. 301; 18 Pac. Rep. 174; 7 Am. St. Rep. 551 (1888). State v. King, 154 Ind. 621; 57 N. E. Rep. 535 (1900). State v. McMillan, 49 Fla. 243; 38 So. Rep. 666 (1905). Marsh v. Sanders, 110 La. 726; 34 So. Rep. 752 (1903). State v. Long, 37 W. Va. 266; 16 S. E. Rep. 578 (1892). State v. Rachac, 37 Minn. 372; 35 N. W. Rep. 7 (1887). Hanson v. Eichstaedt, 69 Wis. 538; 35 N. W. Rep. 30 (1887). In re Caswell, 18 R. I. 835; 29 Atl. Rep. 259; 49 Am. St. Rep. 214; 27 L. R. A. 82 (1893).

of public records, does not include the right to make a copy of a book containing letterpress copies of abstracts, or to make a copy of a tract index to the records, though they were made at public expense and kept in a public office.[20]

§ 84. **Primary purpose of recorder's office.** The office of recorder or register of deeds was never known to the English law. Its establishment was coeval with the establishment of many of the provinces along the Atlantic ocean. For Pennsylvania, it was agreed upon in England between William Penn and the first purchasers of land in 1662 and after various efforts was reduced to a regular system in 1715. This office may be said to form the pivot on which all our titles to real estate turn. The design of it has been to furnish a permanent record of titles and muniments of title to real estate, to make such records constructive notice of their contents to all the world, and to give certified copies of such records the same force and effect as the originals. There is another equally, if not more important design, which is to enable all persons to obtain knowledge of the state of titles to real estate by deeds and mortgages. Without a search there is no safety in dealing with real estate. Search is the essence of the office and is indispensable to effect the design of its establishment and to give certainty and security to the community.[21] Where the statutes charge subsequent purchasers, mortgagees, and judgment creditors with notice of every recorded conveyance or writing affecting real estate, the rule of caveat emptor applies, and it is just and essential to the protection of persons intending to purchase or to take an incumbrance that they be permitted to search the records. When the statute imposes notice and liability, it must by implication extend the right of examination of the records for the protection of anyone who is in a position to be injured if he does not make an examination. To charge the public with notice of the contents of records, and then to deny free access to those interested for an examination of the contents, would be an intolerable mockery in

[20] Davis v. Abstract Construction Co., 121 Ill. App. 121 (1905). See Fidelity Trust Co. v. Clerk, 65 N. J. L. 495; 47 Atl. Rep. 451 (1900). See § 142.

[21] See McCaraher v. Commonwealth, 5 Watts & Serg. 21, p. 26 (1842). Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 255 (1887).

this day and generation, comparable to that perpetrated by the emperor who published his decrees in letters so small on tablets posted so high that they could not be read by the people, and then punished those who disobeyed the decrees.[22] It is obvious that the primary purpose of making and keeping records of titles to land is that the titles and their history may be preserved and protected, so that one who seeks information contained in the records may obtain it.[23]

§ 85. **Who may make the search.** The question at once arises, who may make a search of the records? This depends on the condition of the law in the different states. In the early days in some states the practice was for the recorder and his deputies to make the searches. Where the statute makes it his duty to make searches and to give certificates, and gives him a stipulated fee for so doing, it is the recorder's right and duty to follow the law, and no one else has the right to go to his office and make searches. But in some states it is held that it is no part of the official duty of an officer to make searches of the records in his office for matters affecting the title to real property and to certify to the result of such search. From time to time some person, as one of the public, has insisted that he was entitled to examine the records and has appealed to the courts to sustain his right. Within the past forty or fifty years men have become professional abstracters of titles and have made their livelihood by making abstracts of titles for those who have needed them. The right of these men to make abstracts from the public records and to make tract indices of the records has been denied frequently by the officers in charge of them, and many cases involving their rights to inspection have been before the courts. The decisions in these cases have usually rested largely on statutory provisions, and, as these statutes have not been uniform, there is a lack of uniformity in the decisions in the different states. Similar phrases in statutes have been construed in a directly opposite way by the courts of different states, and the courts and judges in the same states have disagreed as to the correct interpretation of a statute relating to inspection of records.

[22] State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906). Banks v. West Pub. Co., 27 Fed. Rep. 50, p. 57 (1886).

[23] Cormack v. Wolcott, supra.

In some opinions the courts have not confined their decisions to the facts involved, but have entered into broad and general arguments and have made misleading and inadvertent statements which tend to confuse the whole subject of the rights of inspection. In many cases the authorities on the subject are cited without accurate discrimination as to the exact holding in the cited cases. Under such circumstances it is manifest that the statutes and the decisions of the courts must be closely studied in order to determine in a given case who may search the public records, and to what extent they may be searched.[24]

§ 86. **Common law right to inspect public records.** There are not now and there never have been in England any recording acts such as we are familiar with in this country, and there has always been in England great objection to any system of registration which tends to give publicity to the condition of titles. The registries of the counties of York and Middlesex, established about 1708, are still in existence, but they have never been popular and have never been extended to other counties. They are sometimes said to be similar to our recording system, but in reality they are widely different. In these counties the registration of a deed is not in itself constructive notice of its contents.[25]

In a system of jurisprudence which looks to established precedents in the law for guidance in deciding cases, it is natural to go back to the early cases on the subject under consideration. As our systems are, generally speaking, founded on the common law of England, it is quite natural that in deciding cases our

[24] See § 53.

[25] "It is true that a search carelessly made may fail to discover a deed, and that if this be so, the purchaser may be in a worse position than if the register had not been searched,—for a search in the register fixes the person on whose behalf it is made with notice of all deeds registered in the period searched—whether actually found or not, whether reported to the solicitor or not, whether mentioned by him to his client or not. This rule does not apply to official searches. This risk of constructive notice is sometimes given for a reason for the omission to search at all, but if proper care be used, or if, under the new rules, an official search be applied for, this danger can be quite avoided." Registration in Middlesex, Brickdale, page 3 (1892). "It has been decided that entry on the register does not operate as notice, but the register is notice if searched." Morris on Land Registration, page 50.

courts should state the common law whenever it is possible to do so. Several elaborate reviews of the old English cases have been made with the hope of throwing some light on cases which have arisen in this country, involving the right to examine the public records, but it must be confessed that they have failed to elucidate the subject. They lack uniformity and harmony quite as much as do the American cases, and the recording acts of the different states of this country introduce into the subject an element which is totally lacking in the English cases.[26] In passing on the right of inspection of records, courts in this country have assumed quite generally that there was some common law principle governing it, and they have reiterated the statements that at common law a person had no vested right in the examination of public records, and that the right to inspect required an interest in the records to be inspected. The principles as stated are beyond doubt the old English law on the subject and are in harmony with English traditions and prejudices with regard to the secrecy which should surround the condition of titles to lands. Historically and strictly speaking, it was not a part of the common law which was adopted by many of the states as a part of the law of the land. But it is really quite immaterial to inquire whether there was any common law on the subject, or to inquire into the exact state of the common law, for such an investigation would throw no light on the right of inspection of records governed by modern statutes and recording acts. In stating the conclusion that such an inquiry is immaterial it was said: "At common law court records were written in the 'ancient and immutable court hand' in a dead language which few except the officers of court could read, and this method of keeping records, which practically made them sealed books to the public, continued down to the reign of George II. At common law judgments were not liens on land, and the necessity which now exists for examining such records had then no existence."[27] And again it was

[26] The English cases are reviewed at some length in People v. Cornell, 47 Barb. 329. State v. Williams, 41 N. J. L. 322; 32 Am. Rep. 219 and State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545. Copious notes on the English cases are given in 27 L. R. A. 82. They lend little or no aid to the determination of questions relating to the rights of abstracters of titles to search the records.

[27] In re Chambers, 44 Fed. Rep. 786 (1891).

said: "During the crystallization of the early common law the records in England were in the official language which had been inflicted upon that country by the Cæsars, and which was not discernible to the uneducated masses or to many excepting officials and professional conveyances."[28] In another case it was said: "No authorities at common law can throw any light on the question of the right of an abstracter to make a set of tract indices from the records under a statute giving any person free access. The practice of making abstracts of title from the public records is of recent origin."[29]

§ 87. **The rule in the absence of statute.** Whether it is the common law, or not, it is an old and well established rule in England that a person has a right to inspect and take copies of all such books and records as are of a public nature, in which he has an interest, and that no one has the right to inspect public records unless he has an interest in the matter to be examined. It was adopted by the courts of this country, and it is generally spoken of as the rule at common law. So many states have statutes governing the inspection of public records that the rule in this country is stated in a little different way. The rule here is that, in the absence of statutory provisions governing the right to inspect the public records, no one has the right to inspect them unless he has an interest in the matter to be examined. Any person who has an existing or prospective interest in information to be obtained from public records in any public office has a right to make an examination to the extent of his interest. It is not the unqualified right of every citizen to inspect the public records, and one who claims access to them may properly be required to show that he has an interest in the books, documents and papers which he desires to examine, and he may also be required to show that the inspection is for a legitimate and lawful purpose.[30] The state, as an entity independent of its citizens, or perhaps as a combined whole of all of its individuals, has a property right in the records outside of and beyond that vested in each citizen. The state collects fees and taxes under the law and pays the

[28] State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906).

[29] Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 245 (1887).

[30] See Mechem on Offices and Officers, § 738. See §§ 56, 70, 84.

county officers, judges, clerks and assistants in the various offices. It holds the product of their labors as a trustee for all persons who may at any time be interested in them. Its legislature creates the records, gives force and effect to them, has full power and control over them, and has authority to determine by whom and under what conditions they may be searched. Where the legislature has not extended by statute the right to inspect the records, it must be confined to those who have an interest in the matter to be examined.[31]

§ 88. **Dissent from the doctrine that an interest is necessary.** There is no decision holding that, in the absence of statutory provisions granting access to the records, one may examine them without having an interest in the matter under examination. But the doctrine that an interest is necessary as a basis for the right of inspection has been severely criticised by some judges. In one case it was said: "I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it

[31] Owens v. Woolridge, 22 Pa. Co. Ct. Rep. 237; 8 Pa. Dist. Rep. 305 (1899). 1 Dillon, Mun. Corp. (4th Ed.), § 303; People v. Cornell, 35 How. Pr. 31 (1868). Brewer v. Watson, 71 Ala. 299; 46 Am. Rep. 318 (1882). Colnon v. Orr, 71 Cal. 43; 11 Pac. Rep. 814 (1886). In re Caswell, 18 R. I. 835; 29 Atl. Rep. 259; 27 L. R. A. 82; 49 Am. St. Rep. 814 (1893). Daly v. Dimock, 55 Conn. 579–588 (1887). Buck v. Collins, 51 Ga. 391; 21 Am. Rep. 236 (1874). Land Title Co. v. Tanner, 99 Ga. 470; 27 S. E. Rep. 727 (1896). Randolph v. State, 82 Ala. 527; 2 So. Rep. 714 (1886). Boylan v. Warren, 39 Kan. 301; 18 Pac. Rep. 174; 7 Am. St. Rep. 551 (1888). Webber v. Townley, 43 Mich. 534; 5 N. E. Rep. 971; 38 Am. Rep. 213 (1880). Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883). Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 255 (1887). Phelan v. State, 76 Ala. 49 (1884). Brewer v. Watson, 61 Ala. 310 (1878). State v. Williams, 41 N. J. L. 332; 32 Am. Rep. 219 (1879). Townsend v. Register, 7 How. Pr. 318 (1852). In re McLean, 8 Reporter 813 (1879). Mechem on Offices and Officers, §§ 738–739. "Any limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions." 1 Greenleaf on Ev., § 471. See § 84.

must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it, or intend ever to have. I also have the right to examine any title that I see fit, recorded in the public offices, for the purpose of selling such information, if I desire. No one has ever disputed the right of a lawyer to enter the register's office and examine the title of his client to land as recorded, or the title of the opponent of his client, and to charge his client for the information so obtained."[32] In this case the statute gave free access to the records "to all persons having occasion to make examination of them for any lawful purpose," and the issue was whether an abstracter, who had been employed by the owner of property to examine in regard to tax sales, had the right to do so under the statute. The observations made in the opinion about the right of inspection at common law were outside of the issues and are not supported by the citation of any authority. The illustration of the right of a lawyer to make an examination is predicated on his employment by one interested in certain property, and does not support the contention that anyone has the right to inspect such records as he pleases.[33] In another case two judges dissented from the opinion of the court and said: "The majority of the court in determining the interests and rights of the applicants and the duties of the respondent to some extent have chosen to follow the ancient English common law rule emanating from a throne to its subjects instead of the modern American Republican-Democratic doctrine applicable to a government 'of the people, by the people and for the people.' By the former imperialistic rule the keeper of the rolls or records was a deputy of the king from whom all power was derived, and in allegiance to whom all rights were held, who was only permitted to allow such royal subjects to inspect the records who might have or show a special pecuniary interest therein, all others being excluded therefrom, except where public interests were involved. While the modern popular doctrine is that the clerk, the custodian of the records, is the

[32] Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889).

[33] This quotation is an example of the broad arguments and misleading statements which tend to confuse the subject under consideration. See §§ 53, 85.

servant of the people, chosen by them as their trustee to have charge of such records in their behalf, and to hold them open for their inspection at reasonable times, under reasonable regulations, without let, interference or hindrance on the part of such clerk, or inquiry as to the purpose or object of such inspection. Every citizen, tax payer and voter has the presumptive right of such inspection as adhering to his sovereignty, which the clerk cannot deny him unless he can show that the object of the inspection is for illegitimate, improper or scandalous purposes."[34]

§ 89. **Comment on dissent from doctrine of interest.** While it is always pleasant to be told of our rights as free American citizens, we can scarcely accept the suggestion that the requirement of an interest as a basis for the right to examine public records is in any way repugnant to the genius of American institutions. A courthouse is a public building, but a citizen is not on that account entitled to use it, or a part of it, as a private office. A park is a public place and yet a citizen may not occupy a part of it to camp on. One who has no interest in the records,—a stranger to them,—has no inherent right to use them, to occupy space in a public office in searching them, and to require the time of a public officer in guarding them, in order that he may carry on some private work or carry out some private purpose. The rule requiring an interest in them does not offend the dignity of the citizen, and it is just and fair. Nine-tenths of all the examinations of records are made under this rule, even in those states in which free access to the records is given by statute. An abstracter making an abstract of title for an interested person, and a lawyer consulting the records in the interest of his client, are subrogated to the rights of the persons employing them and come within the rule. These and kindred examinations constitute nearly all the work done in the examination of records, for the work done on tract indices is comparatively small.

§ 90. **Rule too restricted in a mechanical way.** The rule requiring an interest as the basis for the right to search the records is broad enough to carry out the design of the creation

[34] Payne v. Staunton, 55 W. Va. 202, p. 214; 46 S. E. Rep. 727 (1904).

of the records, and it is generous enough to protect the dignity and property rights of the citizen. The great trouble with it is that it is now too narrow and restricted in a mechanical way. The volumes of the records have become so numerous that the rule is primitive and impractical. The indices of grantors and grantees are congested and inefficient, and the information contained in the records lies hidden and inaccessible. Abstracters and lawyers, as the representatives of interested persons, are unable to search the records with rapidity, certainty or security to the interests involved. It is impossible for them to follow the chain of title and to know that they have found all the information contained in the records, bearing on the title under examination. A tract index to the records has become absolutely necessary in most counties. It must be made at public expense, or the law must be changed so that those having no interest in the records may examine them and make it as a matter of private enterprise. It is expensive to prepare and keep down to date a set of tract indices, and the services of experts are required in laying out the indices and conducting the work. Down to this time, public tract indices have been successful only after a fashion. This is mild and vague commendation, but more cannot be said truthfully. Legislatures have usually adopted the other plan and have enlarged the right of search by opening the records to the inspection of any person, or by giving in apt language to any person the right to make such indices.[35]

§ 91. **Salutary effect of doing away with interest.** A statute providing that the records shall be open to the inspection of any person has also this salutary effect, that it does away with the necessity of inquiry by the courts into the question as to whether the person desiring inspection of the records has such an interest as entitles him to it. The decisions on this question are numerous, both in this country and in England, and they are so lacking in uniformity that it is not possible to lay down any broad rule governing the sufficiency of the interest to support the right of search. This is especially true of records not controlled by the recording laws, such as records relating to revenues, fees, elections and official conduct.[36]

[35] See §§ 100, 137.

[36] Payne v. Staunton, 55 W. Va. 202; 46 S. E. Rep. 727 (1904). State v. Cummins, 76 Iowa 136;

§ 92. **The general rule can only be changed by the legislature.** The rule is well and thoroughly established under the general law that no one has a right to examine public records unless he is interested in them, presently or prospectively, and that one interested has a right to examine them to the full extent of his interest. Whether or not it should be abridged or extended is a question of governmental policy to be decided by the legislature and not by the courts.[37]

§ 93. **Some decisions under the general law.** A statute provided that every coroner should reduce to writing and return to the clerk of the court in the county the testimony of all witnesses examined in any inquest, with the finding and all certificates sent him by the medical examiner in the case. In construing this, the court said: "The legislature required that such testimony should be reduced to writing by a sworn officer and preserved for future reference. It is enough for our present purpose to say that it is a public document relating to matters of public interest and required by law to be kept by a public officer who is the custodian of the records of judicial proceedings and other public documents. The statute is silent in respect to the purpose for which such writings are preserved and the use to be made of them and by whom. In the absence of any limitation or restriction we must assume that it was intended that they might be examined by any and all persons interested in the subject-matter. We do not consider that we are justified in saying that they may be inspected by one person and not by another. In the absence of legislation to that effect we cannot say that they are for the exclusive use of one person or officer, or that any one person or class of persons may not inspect or use them."[38]

The judicial records of the state should always be accessible

40 N. W. Rep. 124 (1888). State v. Donovan, 10 N. Dak. 209; 86 N. W. Rep. 709 (1901). Marsh v. Sanders, 110 La. 726; 34 So. Rep. 752 (1903). Clay v. Ballard, 87 Va. 787; 13 S. E. Rep. 262 (1891). Brown v. County Treasurer, 54 Mich. 132; 19 N. W. Rep. 778; 52 Am. Rep. 800 (1884). State v. Hoblitzelle, 85 Mo. 624 (1885). State v. Williams, 41 N. J. L. 332; 32 Am. Rep. 219 (1879).

[37] State v. Grimes, Nev. 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906). Cormack v. Wolcott, 39 Kan. 391; 15 Pac. Rep. 245 (1887).

[38] Daly v. Dimock, 55 Conn. 579–588; 12 Atl. Rep. 405 (1887).

to the people for all proper purposes under reasonable restrictions as to the time and mode of examining them, but no one has a right to examine or obtain copies thereof from mere curiosity or for the purpose of creating public scandal. In a case so holding it was said: "It is clearly within the rule to hold that no one has a right to examine or obtain copies of public records from mere curiosity or for the purpose of creating public scandal. To publish broadcast the painful and sometimes disgusting details of a divorce case not only fails to serve any useful purpose in the community, but on the other hand directly tends to the demoralization and corruption thereof by catering to a morbid craving for that which is sensational and impure. The judicial records of the state should always be accessible to the people for all purposes under reasonable restrictions as to the time and mode of examining the same, but they should not be used to gratify private spite or promote public scandal, and in the absence of any statute regulating this matter, there can be no doubt as to the power of the court to prevent such improper use of its records. We advise the clerk that he should not furnish a copy of the case referred to for the purpose named" (for publication or otherwise).[39] In the matter of the inspection of public records, public interest is entitled to more consideration than public curiosity.[40]

While the books and documents of a public office are the property of the public and are preserved for public uses and purposes, it is not the unqualified right of every citizen to demand access to and inspection of them. To entitle one to an inspection of such books and documents, he must show that he has an interest in consulting them and that he desires an inspection of them for a legitimate purpose.[41]

[39] In re Caswell, requesting advice regarding his duty to furnish a copy of the proceedings in a divorce case "for publication or otherwise," 18 R. I. 835; 27 L. R. A. 82; 29 Atl. Rep. 259; 49 Am. St. Rep. 814 (1893). See Colnon v. Orr, 71 Cal. 43; 11 Pac. Rep. 814 (1886). Park v. Free Press Co., 72 Mich. 560; 40 N. W. Rep. 731 (1888). Schmedding v. May, 85 Mich. 1; 48 N. W. Rep. 201 (1901). Crowley v. Pulsifer, 137 Mass. 392 (1884).

[40] Owens v. Woolridge, 8 Pa. Dist. Rep. 305 (1899).

[41] Brewer v. Watson, 71 Ala. 299; 46 Am. Rep. 318 (1882). Colnon v. Orr, supra.

A citizen and taxpayer of the state, desiring to examine bills and vouchers on file in a public office for the purpose of ascertaining alleged irregularities in the allowance and payment of claims against the state, in order that reforms may be inaugurated, has sufficient interest to entitle him to such inspection as a matter of right.[42]

[42] Clement v. Graham, 78 Vt. 290; 63 Atl. Rep. 146 (1906). See State v. Williams, 110 Tenn. 549; 75 S. W. Rep. 948 (1903). State v. King, 154 Ind. 621; 57 N. E. Rep. 535 (1900).

CHAPTER IX.

RIGHT OF ABSTRACTER TO SEARCH THE RECORDS.

§ 94. **Rights of abstracter as agent of interested person.** Under the general law, that is to say, in the absence of statute extending or qualifying the right, an abstracter who has been employed by an interested person to make an abstract of title to certain lands may examine or copy any record which affects or may possibly affect the title, and may search the records in any public office to discover the existence or non-existence of anything of record which may affect the title. He may make the search from the index of grantors and grantees, from the entries on any tract index to which he may have access, or from information obtained from any other source. He has a right to use any index which is required by law to be kept in the office and is in any proper sense a part of the public records. A statute declaring that such indices shall be open to the examination of the public does not extend the right of an interested person to inspect such indices, but merely removes the necessity for an interest. In discussing the right of an abstracter, as an agent, to examine certain indices for the purpose of making an abstract of title, it was said: "The question presented is to what extent a company engaged in the business of examining titles and certifying thereto may have access to and use the indices and cross indices and the judgment records prepared by the clerks of the United States courts. The statute declares that they 'shall at all times be open to the inspection and examination of the public.'[1] This company as one of the public has a right to this inspection and examination. It has no monopoly therein, and cannot interfere with the clerk or his assistants in the discharge of their duties, or with the equal rights of other persons to such inspection and examination. But this limitation is expressly

[1] 25 Stat. at L. 358, chap. 729, U. S. Comp. Stat. 1901, p. 701.

provided for by the second of the two restrictions imposed in the decree. Under this decree the clerk, as custodian, can make such reasonable regulations as will secure to him and his assistants full use of all the books and records of his office, —which, of course, is a primary matter to be considered,— and also will guard against any tampering with or injury to those books and records, and at the same time give to the plaintiff and others access to the indices. From the testimony it is clear that there can be no difficulty on the score of time or otherwise in affording to this company and all others interested every proper facility for inspection and examination. Indeed, it is not contended that there is any trouble in that direction. * * * Very likely, at the time of the passage of the act, the monopolizing of the business of examining titles by one or two corporations was not contemplated. The work was scattered among the separate members of the bar, each one for his own client examining the title to property in which such client was interested. But if congress provided and intended to provide that one, interested in the title to real estate and desiring an examination of judgment liens thereon, should, either by himself or agent, have access to these indices, that intent and that provision are not changed by the fact that the business has passed from the many to a few. The same right of inspection exists whether one is examining only the title to a single piece of real estate or the title to a hundred. The inspection is an assistance to the examination of titles and obviously congress intended that these indices should be open to the inspection of those rightfully making such examinations. Whether parties have a right to make copies in full of these indices is not a question before us, for the decree carefully limits the right of inspection to a transaction or transactions at the time current or depending. So that all that this plaintiff is allowed by this decree is an inspection and examination of these indices, so far as may be necessary to assist in the examination of a title for which it is then employed."[2]

§ 95. **Abstracter as agent, continued.** When an abstracter

[2] Bell v. Title Co., 189 U. S. 131; 23 Sup. Ct. Rep. 569 (1900). See Commonwealth Title Co. v. Bell, 87 Fed. Rep. 19. See also 105 Fed. Rep. 548 and 110 Fed. Rep. 829.

has been employed to examine the title to a particular piece of property, he has an interest in the examination as the agent of his employer, and he falls within the general rule which entitles him to an inspection of the records on account of his interest. It has been held in several cases that while, under a statute giving the right of inspection and examination to "any person," an abstracter is not entitled to the general use of the public office to make a set of tract indices to the public records, he is entitled to make from the records an abstract to the lands in which his principal is presently or prospectively interested. This right is based on the ordinary rules of agency.[3] It is not necessary that one intending to deal with a certain piece of land shall inspect personally the public records. He may do this by his agent or attorney, and a person who prepares an abstract of title from the records for examination by such intending dealer is the agent of the latter. In performing the labor the abstracter is subrogated to all the rights of his principal.[4]

§ 96. **Right of incorporated company to search records.** A corporation making abstracts of title and insuring titles to real estate is entitled to the same right of access to and examination of the public records as an individual. When employed to examine the title to any particular piece of property, such corporation is subrogated to the right of its employer to have such access, and the fact that it may issue a certificate of the result of the examination for a compensation, or that it may issue an insurance policy on the title to the property in question does not detract from such right of access.[5] Abstract makers

[3] Webber v. Townley, 43 Mich. 534; 5 N. W. Rep. 971; 38 Am. Rep. 213 (1880). Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883). Randolph v. State, 82 Ala. 527; 2 So. Rep. 714; 60 Am. Rep. 761 (1886). Newton v. Fisher, 98 N. C. 23; 3 S. E. Rep. 823 (1887). Boylan v. Warren, 39 Kan. 301; 18 Pac. Rep. 174; 7 Am. St. Rep. 551 (1888). Lum v. McCarty, 39 N. J. L. 287 (1877). Barber v. Title Co., 53 N. J. Eq. 158; 32 Atl. Rep. 222 (1895). State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906).

[4] Stewart v. Walker, Neb. ; 113 N. W. Rep. 814 (1907).

[5] West Jersey Title Co. v. Barber, 49 N. J. Eq. 474; 24 Atl. Rep. 381 (1892). Barber v. Title Co., 53 N. J. Eq. 158; 32 Atl. Rep. 222 (1895). Bell v. Title Co., 189 U. S. 131; 23 Sup. Ct. Rep. 569 (1903).

and title companies are a part of the public and are entitled to the same privileges as other persons to the reasonable use of the records under the law, whether statutory or general. In one case[6] it was said: "But it is said that while natural persons may have this right, corporations have not, because they are neither 'persons' or any part of the 'public,' within the meaning of these words in the acts of congress relating to court records. Business pursuits of all kinds are now largely conducted by corporations. They sell goods, lend money, furnish abstracts of title and carry on many other pursuits which make it necessary for them to be constantly advised of the contents of the judgment records in the courts. A corporation must act by its officers or agents, who are citizens, and no citizen loses any of his rights as a citizen because he is a member of, or agent for a corporation; and he has a right to search the record for his own information or as agent for another, and with a view of imparting the information he acquires to his principal, be that principal a natural person or a corporation." In considering the right of a certain abstract company to examine indices to certain records, it was said: "This company as one of the public has a right to this inspection and examination. * * * Very likely, at the time of the passage of the act, the monopolizing of the business of examining titles by one or two corporations was not contemplated. The work was scattered among the separate members of the bar, each one for his own client examining the title to property in which such client was interested. But if congress provided and intended to provide that one, interested in the title to real estate and desiring an examination of judgment liens thereon, should, either by himself or agent, have access to these indices, that intent and that provision are not changed by the fact that the business has passed from the many to a few. The same right of inspection exists whether one is examining only the title to a single piece of real estate or the title to a hundred."[7]

§ 97. **Charter rights of a corporation.** But an incorporated company, whether incorporated under the general laws of the

[6] In re Chambers, 44 Fed. Rep. 786 (1891).

[7] Bell v. Title Co., 189 U. S. 131; 23 Sup. Ct. Rep. 569 (1903).

state or under a special act of the legislature, has no greater right or privilege to inspect and examine public records than an individual citizen. The power and purpose to search the public records, set forth in the articles of incorporation of the company, convey to it no special right of search beyond that which is accorded to any natural person.[8] Where a special act of the legislature granted to certain persons "certain privileges in making an abstract of the records of deeds and mortgages" in a certain county, during such time "as may be necessary to complete the work now commenced by said firm," it was held that the act was incapable of enforcement. The court said: "The enjoyment of this privilege was expressly limited by the terms of the act to such time 'as may be necessary to complete the work now commenced by said firm,' and the act discloses neither the character of work which was in process of completion at the time of the passage of the act, nor does it indicate within what time it is to be completed. So that plaintiffs in error claiming under the act, even if it be constitutional, must show, in order to entitle them to the enjoyment of the special privilege granted by the act, that the enjoyment of that privilege at this time is necessary to the completion of the work commenced by that firm at the time of the passage of the act. Statutes granting special privileges to individuals are to be strictly construed, nor are they to be extended by implication beyond the express provisions of the law granting them. This being true, the provisions of the act in question can in no event be so construed as to extend their operation to records not in existence at the time of its passage, and consequently it cannot confer any right of making for the purpose above stated (making a set of abstract books) abstracts of records made in or after (1881)."[9]

§ 98. **Corporations as abstracters.** In a late case[10] it was said: "The business of furnishing abstracts prepared by professional

[8] People v. Richards, 99 N. Y. 620; 1 N. E. Rep. 258 (1895); People v. Reilly, 38 Hun 429 (1886); Belt v. Abstract Co., 73 Md. 289; 20 Atl. Rep. 982; 10 L. R. A. 212 (1890). Barber v. Title Co., 53 N. J. Eq. 158; 32 Atl. Rep. 222 (1895).

[9] Land Title Co. v. Turner, 99 Ga. 470; 27 S. E. Rep. 727 (1896).

[10] State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906).

and expert searchers, and of guarantying titles is a legitimate one, and meets a want of cautious purchasers desiring to be well assured and guarantied regarding titles. The tendency in large communities is to concentrate the service which previously was performed by attorneys and conveyancers. Persons having or seeking to acquire an interest in property may examine the records for themselves or exercise their choice in employing an attorney or some one to search for them, or they may have the abstracting company furnish an abstract or guaranty the title. * * * Whether changed conditions and growing demands of the community make it desirable to extend to abstract companies the privilege of copying all the records relating to titles and of duplicating all of these in the offices of the county recorders, is a question of policy and expediency for the legislature, and not for the courts to determine." In another case it was said: "These abstract offices, if properly conducted, are of great public convenience, because for well-known reasons they are usually the only place where abstracts of title can be conveniently obtained. It is essential to the convenient and proper transaction of the business that those engaged in it provide themselves with these tract indexes. This can only be done by examination of the records in the register's office, and making copies or abstracts of the same. The right to do this had been usually exercised and conceded without question. But in some instances the right had been denied, and disputes and even litigation over the matter had arisen between the registers and the abstract men."[11] The business of making abstracts of title, whether by individuals or by corporations, is a well recognized and lawful business which has been specifically recognized by statute.[12] When a title company searches the records as an abstracter, it assumes the same liability for negligence and want of skill as an individual does.[13] Large corporations doing an abstract business, with ample capital and a complete set of tract indices, are of

[11] State v. Rachac, 37 Minn. 372; 35 N. W. Rep. 7 (1887).

[12] State v. Scow, 93 Minn. 11; 100 N. W. Rep. 382 (1904); Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883). State v. Rachac, supra.

[13] Economy Ass'n v. Title Co., 64 N. J. L. 27; 44 Atl. Rep. 854 (1899). Ehmer v. Title Co., 156 N. Y. 10; 50 N. E. Rep. 420 (1898), affirming 34 N. Y. Supp. 1132 (1895).

great public security and convenience. Persons desiring abstracts of title may procure them more easily, safely and cheaply through them and the professional assistants employed by them than in any other way. Considering the functions which they perform, especially in the cities, it may be said that they are to-day the most important and effective private agencies in this country in dealing with real estate.

§ 99. **Right of abstracter to make indices to the records.** In the absence of statutory provisions conferring the right, an abstracter is not entitled to examine and take memoranda from all the county records for the purpose of compiling a set of tract indices. Long and laborious opinions have been written in declaring this rule, and many of the statements and arguments in these opinions are confused and confusing. The reasons for the rule are simple. A person who is not interested in the records is a stranger to them. He has no right to use a public office as a work room and to require the service of a public officer in guarding records while he examines them in compiling books for his private use. The business of an abstracter is in some respects of a similar character to that of the officer and in opposition to and in rivalry with some of the business done by the officer, and when an abstracter has no interest in the records, he may not be permitted to interfere with the fees and emoluments of the office. A public office is the right to exercise public employment and to take the fees prescribed by law for services which the one holding it may be called on by members of the public to perform, and a person who has no special interest in matters pertaining to the office has no right to interfere with it. These are the legal reasons why a person having no interest may not examine the public records and make an index to them, in the absence of statutory authority.

The right to search public records has grown in importance during the past forty years, and it is probable that at this time there are in every state statutes governing it. There is only one case involving the right of an abstracter to make an index to the records, in which no statute of the state is cited, and the opinion in that case is sufficiently in harmony with the general law to invoke the presumption that there was no statute governing inspection of records. In that case it

was said: "All persons have the right to inspect these records freely and without charge, and all persons who may desire to do so can get copies by paying the prescribed fees. It is the duty of the register to keep them open to the inspection and examination of all who may desire to inspect and examine them, and for this there is no fee; it is his duty to furnish copies to all who require them and will pay the fees allowed. Perhaps, in addition to this, so long and so universal has been the custom that it may be said to be the right of lawyers and others needing them to take such reasonable memoranda as may not interfere with the rights and duties of the register, and we have never known this refused. We know of no law that requires the register in this respect to do more. No one has the right,—to use the language of the learned judge in the court below,—'to make copies or abstracts of the entire records of the office, including those instruments in which the person so desiring to make abstracts is not at the time interested, but simply anticipates that he will at some time be interested, and abstracts which he desires to make for merely speculative purposes. In this view the plaintiff would be entitled to every facility for the legitimate prosecution of his business by access to the records for the examination of instruments registered, but the court is not satisfied of his right to make an abstract of all transfers of real and personal property for the year 1886, without having an interest in the same, for the prosecution of his business, or paying any fee therefor." [14]

[14] Newton v. Fisher, 98 N. C. 20; 3 S. E. Rep. 823 (1887). See also Scribner v. Chase, 27 Ill. App. 36 (1888).

CHAPTER X.

RIGHT TO MAKE INDICES UNDER STATUTORY PROVISIONS; LIMITED CONSTRUCTION.

§ 100. **Different constructions given to similar statutes.** The rule is well settled that, in the absence of enabling legislation, an abstracter is not entitled to make an index to the public records, and there is no dissent from it. The only question about which there is any disagreement among the authorities is as to whether certain phrases, substantially alike, used in the statutes of several states, do or do not confer this right. There is a divergence between the decisions of courts of different states on the construction to be given to statutes very similar in language and giving the right to search the public records "to any person for any lawful purpose." Some courts hold that such statutes give to the public generally, including any persons, firm or corporation who may be engaged in the enterprise of compiling a complete set of tract indices to all the records of the county, the continuous right at all reasonable hours, by themselves or their agents, to inspect and take extracts and memoranda from the records under reasonable rules and regulations. Other courts hold that such statutes do not give to an abstracter of titles a clear legal right to make a set of tract indices to all the records of the county.

§ 101. **Statute giving right to "any person" construed in limited way.** A firm of abstract makers filed a petition for a writ of mandamus to compel the register of deeds to permit it to make a set of tract indices to the records of the county. The statute then in force provided: "The registers of deeds in this state shall furnish proper and reasonable facilities for inspection and examinations of the records and files in their respective offices, and for making memoranda or transcripts therefrom, during the usual business hours, to all persons having occasion to make examination for any lawful purpose." In interpreting this clause the court said: "The object sought

by the relators may be considered as of such modern origin as not to have been contemplated or covered by the common law authorities relating to the inspection of public records, and the reason upon which those authorities rest would exclude relators from the right claimed. What is the right which relators seek, and the result thereof? But first let us see what it is not. It is not for a public purpose. They do not seek these abstracts for purposes of publication for the use, benefit or information of the public, even if such an unlimited publication could be justified. Relators do not ask for an inspection of a record and abstract thereof relating to lands in which they claim to have any title or interest, or concerning which they desire information in contemplation of acquiring some right or interest, either by purchase or otherwise. It is not as the agents or attorneys of parties seeking information because interested or likely to become so. On the contrary, the right is based upon neither a present nor prospective interest in the lands, either personally or as a representative of others who have, but is for the future private gain and emolument of relators in furnishing information therefrom to third parties for a compensation then to be paid. It is a request for the law to grant them the right to inspect the record of the title to every person's land in the county, and obtain copies or abstracts thereof, to enable them hereafter, for a fee or reward, to furnish copies to such as may desire the same, whether interested or not, and irrespective of the object or motive such persons may have in view in seeking such information. In other words, relators ask the right of copying or abstracting the entire records of the county for private and speculative purposes, they having no other interest whatever therein. Conceding to them this right under such circumstances, and the same must be accorded to all others asking it. Every resident of Jackson county may of right claim a similar privilege. Indeed, the right for such purpose, if it exists at all, cannot be restricted by the residence of the party, so that the result may be more applicants than the register's office could afford room to. Farther than this, to make such abstracts being thus open to all, and being a matter of right, must be granted in such a manner, and such reasonable facilities must be afforded, that the right claimed and exercised will not be barren but

profitable. If none but the applicants are permitted to work, the time consumed in making the abstract will, in many counties, be so long that the full fruits thereof cannot be reaped during the lifetime of the parties. An opportunity, therefore, should be afforded to all to have the work done within a reasonable time. If, therefore, each applicant, with a corps of assistants and clerks, makes demand upon the register for facilities to prepare abstracts, may not that officer find his position a somewhat embarrassing one, and his office uncomfortably crowded, to his inconvenience and that of the public? If, however, this is a matter of right, open and common to all, and which may be enforced by mandamus, must not the proper authorities in such county furnish suitable room and facilities to accommodate all who may desire to exercise this right? If not, and there is to be any discrimination, who shall be favored—who shall be admitted and who excluded? How many clerks or assistants shall each applicant have the right to employ? Who shall determine what shall be considered a reasonable time within which each may complete his abstract? And, as the use of the public records cannot thus be handed over to the indiscriminate use of those not interested in their future preservation, how shall the register protect them from mutilation? This he cannot do personally without neglecting his official duties, and if he must employ clerks or appoint deputies for such purposes, at whose expense shall it be, the law having made no provision for such emergencies? These and many other embarrassing questions must arise if this right is found to exist. It would not, however, end here. This being a right which we might term one not coupled with an interest, must apply equally to the records in each and every public office. True the copies or abstracts from each of the several public offices might not be so profitable to the parties making the same as would those from the register's office, but this would not go to the right to make the abstract. May then parties in no way interested, other than are these relators, insist upon the right to inspect and copy or abstract the records of our courts,—of the treasurers of our counties, of the several county offices; and indeed why with equal propriety may it not be extended to a like right in each of the several state offices? The right once conceded, there is no limit to it until every public office is exhausted.

The inconveniences which such a system would engraft upon public officers; the dangers, both of a public and private nature, from abuses which would inevitably follow in the carrying out of such a right, are conclusive against the existence thereof. It may be said that, even admitting the right to exist, there would be no such number of persons desirous of making abstracts, and that the dangers pointed out would not therefore arise, and in corroboration thereof the past may be referred to. How far the uncertainty of the existence of such an unlimited right in the past may have kept the number of applicants within proper bounds, may have some bearing upon the question, and it may be true that the demand for abstracts of title would have some effect upon the supply offered for sale. We must bear in mind, however, that the larger and more populous the county, the greater would be the demand, and because of the larger number of volumes of records in such a county, a correspondingly increased time and force would be required for each person to perfect his abstract, and the greater danger from abuses exist. Besides in ascertaining whether the right exists, we have a right to inquire into the evils which it would be likely to lead to, and may for this purpose follow up the natural and probable consequences likely to result therefrom, and thereby determine whether justified by the principles of the common-law decisions. From what has been said, a very brief reference to the statute will be sufficient. The language of the act referred to does not in clear and unmistakable terms include a case like the present, and such an one should not be conferred by construction. The object of the act was to enable persons having occasion to make examination of the records for any lawful purpose,—and what would be we have already indicated,—to have suitable facilities therefor, to point out their rights and limitations therein, and the right and duty of the official custodian of the records in connection therewith. This was right and proper, in order to define the respective rights and prevent conflict or confusion, but clearly this act does not extend to a case like the present."[1]

[1] Webber v. Townley, 43 Mich. 534; 5 N. W. Rep. 971; 38 Am. Rep. 213 (1880). This case was overruled in Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889). See Day v. Dutton, 96 Mich 600; 56 N. W. Rep. 3 (1893).

§ 102. **Limited construction, continued.** A statute provided that "the records of the judge of probate's office must be free for the examination of all persons, when not in use by him." This was construed to mean that any person who had an interest, his agent or attorney, had the right of free examination of the records, together with the right to take memoranda and copies of them, but it was held that it did not extend to an abstracter of titles who desired to make tract indices of all the records for future use when required in his business. It was said: "It is not the unqualified right of every citizen to demand access to and inspection of the books and documents of a public office, though they are the property of the public and preserved for public uses and purposes. The qualification of the rule is that no person can demand that right save those who have an interest in the record, their lawful agents or attorneys. We must not, however, be understood as intending to abridge the right, conferred by statute, of 'free examination,' by all persons having an interest, of the records of the probate judge's office. Nor will we confine this right to a mere right to inspect. He may make memoranda or copies, if he will, and, to this end, may employ an agent or attorney. The limitation is that he must not obstruct the officers in charge in the performance of their official duties by withholding records from them when needed for the performance of an official function. Nor is this right of examination confined to persons claiming title, or having a present pecuniary interest in the subject-matter. It will embrace all persons interested, presently or prospectively, in the chain of title, or nature of incumbrance, proposed to be investigated. The right of free examination is the rule, and the inhibition of such privilege, when the purpose is speculation, or from idle curiosity, is the exception." [2]

§ 103. **Limited construction, mandamus.** A recorder may not be compelled by mandamus to permit an abstract maker to use his office and the county records for the purpose of abstracting

[2] Randolph v. State, 82 Ala. 527; 2 So. Rep. 714; 60 Am. Rep. 761 (1886). See Brewer v. Watson, 71 Ala. 299; 46 Am. Rep. 318 (1882). Phelan v. State, 76 Ala. 49 (1884). § 3367, Statutes of Alabama, Acts 1889, provides that the records must be free for the examination of all persons, whether such persons are interested in such records or not.

the entire records of the land titles of the county, even though the statutes provide that "all books and papers required to be kept in his office shall be open for the examination of any person." In so deciding it was said: "We are of opinion that the statute in question was not designed to allow individuals who wish to abstract the entire records for future profit in their private business, the privilege of using continuously the public property, and of monopolizing from day to day, for months and years, a portion of the time and attention of a public officer against his will and without recompense."[3] The same construction was given in another case[4] to a statute providing that records "shall be open for the examination of any person." The opinion follows the same line of argument set forth in Bean v. People, supra, and, among other things, says: "This right of inspection should be exercised only by persons who have an interest in the record, or by some one for them, for the purpose of information, and was not intended to give a right to parties to engage in private speculation in connection with the information there received."[5]

§ 104. **Limited construction, index misunderstood.** The case of Buck v. Collins,[6] decided in 1874, has been frequently cited and quoted from as sustaining the doctrine that, under a statute giving the right of inspection to all citizens and providing for a fee to the clerk when his aid is required, an abstracter of

[3] Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883). In 1885 the legislature passed an act in part as follows: "Any person or corporation engaged in making abstracts or abstract books, and their employees, shall have the right to inspect, make memoranda or copies of the contents of all books and papers for the purposes of their business under reasonable and general regulations, and, if any officer shall refuse or neglect to comply with the provisions of this section, he shall forfeit for each day the sum of $5.00, to be collected in the name of the people and paid into the school fund; provided that this section shall not interfere with or take away any right of action for damages by any person injured by such refusal or neglect." See Stocknan v. Brooks, 17 Colo. 248; 29 Pac. Rep. 146 (1892).

[4] Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 255 (1887). At the next session of the legislature an act was passed giving to any person the right to make a tract index to the records.

[5] See §§ 60, 76.

[6] Buck v. Collins, 51 Ga. 391; 21 Am. Rep. 236 (1874); affirmed as to reasoning and decision in Land Title Co. v. Tanner, 99 Ga. 470; 27 S. E. Rep. 727 (1896).

titles has no right to make tract indices from the public records, and that the clerk is entitled from an abstracter doing a general business in the office to fees for each inspection and each abstract, whether the aid of the clerk is required or not. It is evident from a close reading of this opinion that the judge who wrote it thought that the abstracter was seeking to prepare for publication a book which should set forth the condition of the titles to lands in the county, including mortgages, judgments, etc., for sale upon the public market. He said: "Under these laws, the complainant insists that he has a right to go into the clerk's office, during office hours, from day to day and from month to month, at his pleasure, copy from the books, when they are not in use, at his option, and thus collect material for a book which he proposes to publish for sale. * * * In the first place, we doubt if the avowed object of the complainant is not a perversion of the purpose for which the books are kept. The necessities of society and the protection of those dealing with property, require that these records shall exist. That the title to land, the fact that mortgages or judgments exist, shall be capable of being inquired into by those interested. This is, as we have said, a necessity of society, and this necessity begets the necessity for books and records. The character of one's title, and whether one has mortgages or judgments against him, is thus of necessity open to inquiry, and the public, by providing books and records, meets this necessity. Men are required, for the protection of purchasers and to secure fair dealing, to put their titles upon record, and to expose, in some respects, what they may have strong inducements to keep secret. But while the public interest thus provides a mode by which any one may learn the truth upon inquiry, it is no part of the public scheme to make this exposure universal. It provides that those who seek the information can get it, but it does not and ought not to flaunt the information its records contain before the public gaze, and thus make a scandal of a public necessity. The object of the record is to furnish to those needing it the information the record contains. That object is attained when its books are open to inquiries as these occasions present themselves. The object sought by the complainant, to-wit: to put the substance of these records into print, to be sold and put in the hands of any one who

may chance to buy or to borrow, is an extension of this publicity beyond the necessities which make the record justifiable, and is a perversion of the object sought by the requirement to record. It is an unnecessary flaunting of private matters before the public gaze. * * * If the complainant has the right to do what he claims, he has the right to keep the clerk's attention from minute to minute, and from day to day, until his book is finished. * * * The avowed object of the complainant is to furnish to the public the contents of the books and papers of the clerk's office for his own profit. He proposes to say to the public, 'if you desire to inquire into a title or into the incumbrances upon an estate, or into the judgments against a citizen, you need not visit the clerk's office, you need not pay him any fees. Here is my book—it is all there: you can get what you want without fees.'' [7]

§ 105. **Statute is not declaratory of general law.** If a statute which declares that records shall be open to the inspection of any person for any lawful purpose does not give the right of search to one who has no interest in the records to be examined, it is of no force and effect whatever, and is merely declaratory of what is often called the common law on the subject.[8] But an analytical consideration of such a statute and of the general law on the right to inspect public records will clearly show that such a statute can only mean that any person may make a tract index to the records. There are only three classes of persons mentioned in the books as having occasion to examine public records,—one whose motive is an idle curiosity, one who is interested in some special records and one who has a private or speculative purpose. The person who desires to spend his time in examining dry and uninteresting records merely to satisfy an idle curiosity is, of course, a myth, a creature of the imagination. But he represents the meddler and the person who desires to publish defamatory and scandalous matter contained in the records. Such persons have no standing in court to assert their rights under any possible state of the law, and they are unworthy of any enabling legislation. It cannot be supposed that such a statute has been passed for their benefit. In the absence of legislation, a person has a right to examine

[7] See § 134.

[8] Hanson v. Eichstaedt, 69 Wis. 538; 35 N. W. Rep. 30 (1887).

such records as he is interested in and to make such searches as may be necessary to discover the existence or non-existence of anything of record, which may affect his interests. Such a statute does not add to his rights and is not for his benefit. The one with a private or speculative purpose, having no right under the general law to inspect public records, is the one whose rights are created by such a statute. It must be intended for his benefit, for there is no one else to whom it may apply. Without enabling legislation he may carry on his business as the agent of interested persons, but without it he may not search the records in his own right. The purpose of such a statute is to give him this privilege.

§ 106. **Laws extending the right to search should be liberally construed.** Congress and the legislatures of most states have done away with the necessity for interest and have passed laws extending the right of inspection and examination. Some of these statutes have been construed so as to limit the right of search under them, and the legislatures have again passed laws clearly and unmistakably extending the right. For instance, in Colorado and Kansas the statutes provided that the records should be open for the inspection of "any person." The supreme courts of these states held that under such statutory provision an abstracter of titles was not entitled to make a set of tract indices of the records.[9] Immediately after these decisions were rendered, the legislatures of these states passed laws providing expressly that abstracters should have the right to inspect all records and to make memoranda of their contents for the purposes of their business.[10] It is in legislative enactments, and not in the decisions of courts, that we find a distinct departure from the old English rule and a disposition to open up the public records to public inspection, in order to meet the requirements of modern methods of dealing with titles to lands. In considering laws which have been passed to extend the right to search and examine them, it must be remembered that public records are public property, kept in a public place, at the public expense, for the public benefit.[11]

[9] Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883). Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 255 (1887).

[10] § 103. See § 102 for provision of Alabama code.

[11] Lum v. McCarty, 39 N. J. L. 287 (1877). In re Chambers, 44 Fed. Rep. 786 (1891).

Many of them are constructive notice to all the world of the contents of them. They are made by the authority and direction of the state or general government for public purposes. The laws creating them are not revenue measures, and such records are not made and kept as a source of revenue to the sovereign power creating them. It is also important to remember that they are not made and kept for the private gain of the officer charged with the duty of making and protecting them.[12] From this it does not follow that every person has or should have the unqualified right of free inspection of the records for any purpose, but it would seem to follow as sound public policy that the greatest liberty of inspection should be accorded to everyone, consistent with the public interest and the due administration of the office containing them. Some courts have assumed that at common law no one could examine public records unless he had an interest in the matter to be examined, and they have treated statutes extending the right of inspection as being in derogation of the common law and as requiring a strict and limited construction.[13] But as has been said,[14] the so-called common law rule is not such in any proper and historical sense. The records to be searched are created by our own laws for purposes unknown to the English system of dealing with titles to land, and it certainly cannot truly be said that any act extending the right to search such records is in derogation of the common law of England. The legislature has the undoubted power to authorize any person it may see proper to have free access to public records for the purpose of transcribing or inspecting them for such purposes as it may deem the public interests to require, and to that end it may grant free access to all offices wherein such records are kept. The officer has no exclusive vested right, beyond the reach of legislative enactment, to make copies of the records, and no mere official perquisite will stand against its action.[15] It is competent for the legislature to grant

[12] In re Chambers, supra.

[13] Webber v. Townley, infra. Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883). Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 255 (1887). Randolph v. State, 82 Ala. 527; 2 So. Rep. 714; 60 Am. Rep. 761 (1886). Buck v. Collins, 51 Ga. 391; 21 Am. Rep. 236 (1874).

[14] See §§ 86, 87.

[15] Silver v. The People, 45 Ill. 224 (1876). See also Hawes v. White, 66 Me. 305 (1867).

free access to the public records and documents, and to surround the privilege of examination with such limitations and restrictions as it may deem necessary and proper.[16] It has been said that the language of an act giving the right of free inspection should be in clear and unmistakable terms and that no such right should be given by construction of a vague statute.[17] But in view of the purposes and effects of our recording acts which were utterly unknown to the common law, and in view of the authority and control of the legislature over our public records, the better rule would seem to be that the language of such an act should be construed liberally and literally, so as to extend rather than to restrain the right of inspection. In construing such an act, the principle should be that the right of examination of public records is to be favored, and that the inhibition or restriction of the privilege of examination is to be avoided unless it is clearly enjoined by the act.[18]

§ 107. **Danger and inconvenience in permitting tract indices to be made.** It has been said that where the statute gives the right of access to the public records to any person, the question of the right of an abstracter to make a set of tract indices from such records is embarrassing and not free from doubt.[19] Where it has been held that an abstracter has no such right, the decisions have been placed, in part at least, on the ground that danger and inconvenience will result from such a use of the public records. It has been suggested that if one person, firm or company has the right to use the public office and records for that purpose, others have the same right, and that two or more abstracters with their clerks and assistants might at the same time prepare such indices, fill up the office and impede the work of the officer in charge.[20] It has also been suggested that the business of an abstracter is permanent, and to carry it on successfully he must not only by himself and his agents occupy the recorder's office for weeks, and perhaps months, in abstracting

[16] State v. McCubrey, 84 Minn. 439; 87 N. W. Rep. 1126 (1901).

[17] Webber v. Townley, 43 Mich. 534; 5 N. W. Rep. 971; 38 Am. Rep. 213 (1880), overruled in Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889).

[18] But see §§ 83, 142.

[19] Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 245 (1887).

[20] Cormack v. Wolcott, supra. Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883).

the instruments already recorded, but he must also be there daily thereafter abstracting conveyances filed from day to day; that the interruption and annoyance of the officer in charge are not temporary, but are continuous and permanent.[21] The wear and tear of the records from frequent handling, the possibility of alteration, mutilation or defacement of the records, the requirement of large space for the accommodation of the persons employed by the abstracter, and the cost of the numerous deputies to watch the records in the hands of the searchers, have all been commented on in such cases and urged as reasons why such a statute did not extend to an abstracter of titles who desired to make tract indices to the records.[22] On this subject it was said: "We have no hesitation in saying that nothing less than the plain and explicit terms of the statute could justify a construction so fraught with danger to the highest public interest."[23]

§ 108. **Danger and inconvenience not a convincing argument.** But the arguments founded on the dangers and inconveniences likely to arise from the use of the records by abstracters of titles are not acquiesced in by all the courts. In one case it was said:[24] "I cannot agree with the opinion of this court or the reasons given for it in Webber v. Townley, supra; nor do I anticipate that hardly any, if any, of the results imagined by the writer of that opinion would ever occur if the holding were otherwise. If any of them should happen, the law is powerful enough to remedy them and 'sufficient unto the day is the evil thereof.' * * * I can see no danger of great abuses or inconveniences likely to arise from the right to inspect, examine or make note of public records, even if such right be granted to those who get their living by selling the information thus gained. The inconvenience to the office is guarded against by the statute which authorizes the incumbent to make reasonable rules and regulations with reference to the inspection. And

[21] Bean v. People, supra.

[22] Cormack v. Wolcott, supra. Belt v. Abstract Co., 73 Md. 289; 20 Atl. Rep. 982; 10 L. R. A. 212 (1890). Buck v. Collins, 51 Ga. 391; 21 Am. Rep. 236 (1874). Webber v. Townley, 43 Mich. 534; 5 N. W. Rep. 971; 38 Am. Rep. 213 (1880). See § 51.

[23] Belt v. Abstract Co., *supra*.

[24] Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889).

when abuses are shown there will no doubt be found by the legislature or the courts a remedy for them." With regard to the suggestion that rival abstracters may at the same time fill the recorder's office with their assistants in the preparation of tract indices, it has been said that a difficulty merely anticipated and practically not likely to occur is not a sound argument, and that there is no serious difficulty in procuring larger accommodations and more clerical help if the demand for inspection of the records requires it.[25] The wear and tear of the records incident to the legitimate public use of them is no concern of the court, or of the custodian of the records. When worn out in a use to which they are dedicated by the legislature, the appropriate authority may be relied on to make provision for rewriting or renewing them, as has often been done in such cases.[26] It is often said that the public use of records may result in the alteration or mutilation of them, but this cannot be received as an argument against such use, because it is a use to which they are devoted by the act of the legislature providing for them and making them constructive notice of their contents to all the world.[27]

§ 109. In reference to the cases which have dwelt on the dangers and inconveniences likely to arise from permitting abstracters to make tract indices from the records, a well-known writer has said:[28] "Not the least among the reasons assigned in the foregoing class of cases is solicitude for the preservation of the sources of information. The public records, it is said, are the repositories of the rights of persons and of property, and in many cases hold the only evidence of either, and the law imposes upon courts and ministerial officers the duty of their secure and careful protection and preservation; a protection and preservation which might be greatly jeopardized if every citizen at his will and pleasure should be permitted to inspect, examine and copy them in his own way. It must be admitted that the argument is weak when applied to any particular class as contra-distinguished from the general public, and fanciful when applied to actual facts as they are presented in every county in

[25] People v. Cornell, 47 Barb. 329 (1866). See also Bell v. Title Co., 189 U. S. 131; 23 Sup. Ct. Rep. 569 (1903).

[26] In re Chambers, 44 Fed. Rep. 786 (1891).

[27] In re Chambers, supra.

[28] Warvelle on Abstracts, page 65.

the country. Mutilations of records are rare, and when instances of this kind do occur, it will usually be found that the mutilation has been accomplished by some person having a special interest therein—in other words, by one whom the law says may inspect them. It is a significant fact that the case in which this theory was first advanced, and which has served as the keynote for every subsequent decision of similar import, has since been overruled in the court where it was pronounced.[29] As a matter of fact, no class of the community are more directly interested in the preservation and integrity of the records than the compilers of abstracts, and on more than one occasion their indices and references have been brought into requisition to protect public interests and prevent confusion of titles."

There is no propriety in clinging to old ideas simply because they are familiar, in arguing in favor of a system of official searches because the officer has custody of the records, in refusing to recognize the value of recent and modern methods of indexing and examining records, or in holding tenaciously to an old method of making abstracts which is slow, expensive and insecure. It is profitless to set forth in high sounding phrases unnecessary fears for the safety and integrity of the public records or for the privacy of the transfer or mortgaging of real estate. It is ignoring the nature of public records as constructive notice and the necessity of scientific methods of examination to complain that the time and attention of the custodians of records may be monopolized by persons engaged in the work of preparing indices for the conduct of their business and for the ultimate public convenience and security.[30]

§ 110. **Danger and inconvenience, legislation.** The arguments founded on the dangers and inconveniences which might arise by opening the records to the inspection of abstracters for the purposes of their business have not appealed to the legisla-

[29] This statement is slightly inaccurate. The first case in which such arguments were set forth was Buck v. Collins, 51 Ga. 391; 21 Am. Rep. 236, decided in 1874; affirmed as to reasoning and decision in Land Title Co. v. Tanner, 99 Ga. 470; 27 S. E. Rep. 727 (1896). The second case, Webber v. Townley, 43 Mich. 534; 5 N. W. Rep. 971; 38 Am. Rep. 213, was decided in 1880 and was subsequently overruled in Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889).

[30] See § 99.

tures of the many states which have provided for free access to the records. Before abstract companies were so general and so well understood, and while the necessity for them was not so apparent, there was a tendency on the part of the courts to look with disfavor on the granting to them of the privileges of inspection of the county records for the purpose of making tract indices. But of late years, since the necessity for tract indices has been fully recognized, legislation has been strongly in favor of professional abstracters, and the courts have put aside their fear that the integrity of the records may be violated by the comparatively small search which is necessary in preparing a tract index. In making an index an abstracter takes memoranda from a recorded instrument but once. The index is a source of expense, not of profit, and it is prepared as a guide and aid in the conduct of a business. This business consists in making abstracts of title for interested persons, and in conducting it as a means of livelihood almost all the examining is done. The dangers and inconveniences in examinations by abstracters are certainly no greater when they are engaged in making tract indices than when they are engaged in the far greater work of making abstracts of title for those who need them in pending transactions in real estate; and yet it must be admitted that, in the absence of prohibitive legislation and subject to reasonable rules and regulations, they are entitled to make abstracts fully and freely as the agents of interested persons.

§ 111. **Bad feeling between officers and abstract men.** The dangers and inconveniences of permitting abstracters to make a set of tract indices from the records have been urged upon the courts by the officers in charge of the records, between whom and the abstracters bad feeling had been aroused. Where the officer feels that he has the power to permit the abstracter to make an index or to prevent him from making it, just as he may choose, and the abstracter thinks that he has a right under the statute to make an index, feelings of hostility are easily engendered. It is to be noted that the case of Brewer v. Watson, involving the right to inspect public records, went to the supreme court three times.[31] After the decision in Burton v. Tuite,[32] the record of which shows a very bitter controversy,

[31] 61 Ala. 310; 65 Ala. 88; 71 Ala. 299.

[32] 78 Mich. 363.

the officer refused to permit the relator to inspect certain records in accordance with the writ of mandamus, and in a subsequent proceeding he was adjudged guilty of contempt and disobedience of the writ, and fined by the supreme court.[33] There is a suggestion in the record in a few cases that the reason why the officer objects to the enterprise of the abstracter is because the officer is preparing a set of tract indices to be used by him in the business of making abstracts as soon as his term of office shall expire. But when the whole field of operations is viewed, when the great number of counties is considered, in which one or more tract indices to the records have been made, it is only surprising that more appeals to the court have not been made. In one case it was said: "The right to do this (make a tract index) had been usually exercised and conceded without question. But in some instances the right had been denied, and disputes and even litigation over the matter had arisen between registers and the abstract men."[34] All over this country this right has been exercised and conceded without question. The officers in charge of the records have clearly seen that it was impossible to make abstracts of title with rapidity and accuracy without the aid of an index, and that the public convenience and necessity required that an index be made. They have found that in offices where an index had been prepared, the general public, working slowly along the old lines and in the old methods, gradually ceased to frequent the offices, and they have recognized that this was a good thing for the preservation of the records and for the administrative work of the office. Men who have been elected to office are not usually lacking in the political sagacity which suggests that they make friends of the voters of the community, and when one of the public visits the office to get information contained in records with which he is wholly unfamiliar, it usually means, except in the larger cities, that the officer or one of his deputies must cease his work and hunt for the desired information. In such instances, and in many others, the abstracter with an index assists the officer, and in assisting each other, they work in parallel lines without friction or hostility. Generally speaking, the recorder or register of deeds is not a lawyer or a man who has had any experience in

[33] Burton v. Tuite, 80 Mich. 218; 45 N. W. Rep. 88.

[34] State v. Rachac, 37 Minn. 372; 35 N. W. Rep. 7 (1887).

conveyancing or in the technicalities of the laws of real estate, and the professional abstract maker doing business in his office becomes his adviser and assists him in various ways. It is greatly to the credit of the officers and their deputies and the abstracters and their assistants, in the many offices throughout the country, that they so conduct themselves as to live in harmony, all respecting the rights of each. County officers, advised as to their own rights and as to the rights of abstracters, know that an abstracter is entitled to examine the records as the agent of one interested in them, and they also know that he can make an examination much more rapidly and with less inconvenience to all persons concerned with the aid of an index. Unless some antagonism has been aroused, there is seldom any objection to the making of a tract index by the abstracter.

§ 112. **Right to search records for the purpose of selling information to others.** In one case it was said that the right to search public records is controlled to some extent by the objects for which the examination is made or the use to be made of such information; that where the information is to be used in the making of a tract index for the purpose of private gain in the sale of abstracts, solely for the benefit of the maker of the tract indices, for no public use or purpose, and not for the purpose of examination of any particular title in which he has an interest as principal or agent, but solely for the purpose of selling abstracts, the privilege will not be granted.[35] The first clause correctly states a general principle of the law, but the second clause is confused and misleading. In the absence of a statute removing the necessity for an interest in the matter to be inspected, an abstracter may not examine the records for the purpose of making a tract index, for the good and sufficient legal reason that he has no interest in the matters to be inspected. The fact that he intends to prepare abstracts after he perfects his index does not bear on the question of his right to make the searches. His purpose to prepare abstracts is not illegal, but as a stranger he has no right to make the search in order to make an index. Other opinions contain obscure references to the fact that the abstracter desires to equip himself with material for the sale of abstracts.[36] But in one case it was said

[35] Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 245 (1887).

[36] Buck v. Collins, 51 Ga. 391; 21 Am. Rep. 236 (1874). Bean v.

that, under a statute giving access to the records to all persons for any lawful purpose, an abstracter may not be deprived of the right to examine them and make a tract index, merely because he proposes to use the records to prepare abstracts of title for other persons for a compensation.[37]

The suggestion that an abstracter in the conduct of his business sells information or sells abstracts of title is inaccurate and confusing. He does not collect information and prepare abstracts and keep them on hand for sale. He is not in a commercial business. He does not deal in commodities or articles of commerce which sell at so much a sheet or so much a roll. He is in the agency business, and he undertakes for hire to examine the mass of records containing hidden information on titles to real estate, and to make a written report of the search as to certain specific property. This written report is the evidence of the way in which he has done his work and is commonly called an abstract of title. No such report is made by him unless he has been employed to make it. He does not sell his report, but charges his employer for his services in making it. An abstracter acts as an agent in making the search, even though he proposes, on the strength of the examination and for a compensation, to certify as to the condition of the records, or is to issue a policy of insurance on the title.[38]

§ 113. **Generally of the cases just considered.** The five cases, in which statutes giving the right of inspection to "any person" have been construed in a limited way, have been quoted from and reviewed at length. One of them has been overruled, three of them have been nullified by the legislatures of the states in which they were rendered, and in one of them the nature of a tract index was entirely misapprehended.[39] The statements, suggestions and arguments contained in these opinions have been discussed fully, and the conclusion is irresistible that the judges who wrote them did not have in mind the fact that abstracters, as the agents of interested persons, have the right to occupy space in the county offices and to make searches of the public records.

People, 7 Colo. 200; 2 Pac. Rep. 909 (1883).

[37] Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889).

[38] See §§ 1, 35, 36.

[39] Webber v. Townley, overruled. Statutes permitting general inspection were passed in Colorado, Kansas and Alabama.

CHAPTER XI.

RIGHT TO MAKE INDICES AND INSPECT RECORDS UNDER STATUTORY PROVISIONS; LITERAL CONSTRUCTION.

§ 114. Statute giving right to "any person" construed literally. After the decision in Webber v. Townley,[1] the legislature of Michigan passed an act [2] substantially the same as the one construed in the Webber case, providing that the custodian of public records should furnish proper and reasonable facilities for the inspection and examination of such records, and for making memoranda and transcripts therefrom, "to all persons having occasion to make examination of them for any lawful purpose." An abstract maker asked for a writ of mandamus to compel an officer to furnish him proper and reasonable facilities for making examinations, memoranda and transcripts of tax sales in compliance with the act. In passing on this petition the court overruled the case of Webber v. Townley,[3] and said: "I cannot agree with the opinion of this court, or the reasons given for it, in Webber v. Townley, supra; nor do I anticipate that hardly any, if any, of the results imagined by the writer of that opinion would ever occur, if the holding were otherwise. If any of them should happen, the law is powerful enough to remedy them, and 'sufficient unto the day is the evil thereof.' I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it, or intend ever to

[1] 43 Mich. 534; 5 N. W. Rep. 971; 38 Am. Rep. 213 (1880).

[2] Laws of 1889.

[3] See Day v. Button, 96 Mich. 600; 56 N. W. Rep. 3 (1893).

have. I also have the right to examine any title that I see fit, recorded in the public offices, for the purposes of selling such information, if I desire. No one has ever disputed the right of a lawyer to enter the register's office, and examine the title of his client to land as recorded, or the title of the opponent of his client, and to charge his client for the information so obtained. This is done for private gain, as a part of the lawyer's daily business, and by means of which, with other labors, he earns his bread. Upon what different footing can an abstracter —can Mr. Burton—be placed, within the law, without giving a privilege to one man or class of men that is denied to another? The relator's business is that of making abstracts of title, and furnishing the same to those wanting them, for a compensation. In such business it is necessary for him to consult and make memoranda of the contents of these books. His business is a lawful one, the same as is the lawyer's, and why has he not the right to inspect and examine public records in his business as well as any other person? If he is shut out because he uses his information for private gain, how will it be with the dealer in real estate, who examines the records before he buys and sells, and buys or sells for private gain? Any holding that shuts out Mr. Burton from the inspection of these records for this reason also shuts out every other person except the buyer, seller, or holder of a particular lot of land, or one having a lien upon it, or an agent of one of them, acting as such agent without fee or reward. It cannot be inferred that the legislature intended that this statute should apply only to a particular class of persons, as, for instance, those only who are interested in a particular piece of land. 'Any person' means all persons. I can see no danger of great abuses or inconveniences likely to arise from the right to inspect, examine, or make note of public records, even if such right be granted to those who get their living by selling the information thus gained. The inconvenience to the office is guarded against by the statute, which authorizes the incumbent to make reasonable rules and regulations with reference to the inspection. And when abuses are shown there will no doubt be found by the legislature or the courts a remedy for them. It is plain to me that the legislature intended to assert the right of all citizens, in the pursuit of a lawful business, to make such examinations of the public records in public

offices as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper under the circumstances. The respondent in this case is the lawful custodian of these sales-books, and is responsible for their safe-keeping, and he may make and enforce proper regulations, consistent with the public right, for the use of them. But they are public property, for public use, and he has no lawful authority to exclude any of the public from access to and examination and inspection thereof at proper seasons.[4] It follows that he has no right to demand any fee or compensation for the privilege of access to the records, or for any examination thereof not made by himself or his clerks or deputies. He has no exclusive right to search the records against any other citizen."[5]

§ 115. **Comment on Burton v. Tuite.** It will be observed that the petition in this case was filed against the city treasurer, who however, was a custodian of public records under the statute, and not against the register of deeds, and that the case of Webber v. Townley, supra, was not expressly overruled. But in a later case,[6] where several abstract makers filed a petition against the register of deeds, it was held that the right to examine the records and files of his office and make memoranda therefrom for the purpose of making a set of tract indices was established in Burton v. Tuite, supra, and that Webber v. Townley, supra, was overruled by that case. In quite a late case,[7] where the case of Burton v. Tuite, supra, was under discussion, it was said: "But in reality and stripped of its dicta, it was held * * * that relator, who had been employed by the owner of the property to examine in regard to tax sales, or where these sales were liens upon property to which he was furnishing abstracts, had the right to make examinations of the public records as the necessity of his business might require, and that this right was assured him under" the statute above referred to. The statement of the allegations of the petition set out in the opinion seems to indicate that the relator desired access to the

[4] Lum v. McCarty, 39 N. J. Law 287.

[5] Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889). Aitcheson v. Huebner, 90 Mich. 643; 51 N. W. Rep. 634 (1892).

[6] Day v. Button, supra.

[7] State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906).

records in such specific cases rather than to make indices to the records of tax sales, but the respondent placed his refusal to permit the examination on the broad grounds that the records were not public, and that the relator was an abstract maker who sold the information obtained for private gain and was not an examiner for a lawful purpose, as contemplated by the statute. Under these issues, pressed with much bitter feeling, a wide scope was given to the language and argument of the opinion. In the case of State v. Grimes, supra, in further discussion of the opinion in the case of Burton v. Tuite, supra, it was said: "Apparently these remarks met the approval of Chamberlin, J., who concurred without qualification, but not of the majority of the court, for Campbell, J., whose concurrence in the judgment made it effective, confined his opinion to the point that the relator had such an interest under the act mentioned as entitled him to see the books in question. Sherwood, C. J., and Long, J., did not sit, and these statements may be considered as sanctioned by only two of the five justices. The case rested upon the Michigan statute. No English or other decision was cited that supported the assertion of Justice Morse that he knew of no common law that denied the right of free inspection or required the citizens desiring to make it to show some interest in the record. Although this language is interesting as a statement of the opinion of an able member of a court of high standing, it was not only unnecessary for the determination of the case as controlled by legislative enactment, and unsupported by any authority excepting the concurrence of one of the justices, but it was a begging of the question, for, if no common law prevails in this country which prevents, and there is no decision sustaining the right of an abstract company or others to inspect or copy all the records in which it, or they, have no interest as owner or agent, it is evident that no such right exists unless granted by statute. With no decision conceding or denying such right, nothing appears on which to base the assumption that it is authorized by common law." The decision in Burton v. Tuite must probably be confined to the points set forth in the first quotation from the Grimes case, and the opinion is certainly subject to the comments stated in the last quotation. The record in the case, as disclosed by the opinion, shows that the custodian of the records had treated the abstracter in an overbearing manner

and that there was much bad feeling between them. In fact, after the decision of the case, the custodian refused to obey the order of the court and was fined for disobedience of the writ.[8] Under such conditions the judge wrote an opinion which was a kind of protest against officialism, exclusion and monopoly, and, judging from the frequency with which it has been quoted, the opinion has found favor with those who have been permitted as a matter of course to examine the records, as has been the custom in most of the counties, at least in the middle and western states.

If the case of Burton v. Tuite, supra, stood alone, it could not be considered as a satisfactory authority to establish, under the statute referred to, the right of an abstracter to make a set of tract indices from the records, but taken in connection with a later case from the same court[9] and with the force and effect given to it in that case, it must be looked upon as having established that doctrine. In Day v. Button, supra, it was said: "The record seems to warrant the conclusion that respondent denies to relator the use of the records and a place to make memoranda for a set of abstract books, upon the ground that he has no legal right to the same. If the case of Webber v. Townley[10] justifies this contention, we think the decisions of this court in the cases of Burton v. Tuite[11] have overruled the case of Webber v. Townley and established the right of a person to look at the records and make memoranda for a set of abstract books. This right does not permit the register to be unduly annoyed by a large force, or by work at unreasonable hours, or by the monopoly of furniture, office room or records to the exclusion of other persons, or interfere with his right to prescribe a reasonable use of the same. It does, however, require that he recognize relator as one of the public and accord to him reasonable privileges for the accomplishment of his purpose. We do not feel called upon to specify the number of persons that respondent must accommodate or to prescribe the rules which he may require relator to observe. These should be made with reference to the circumstances and with a view to the reasonable use by

[8] Burton v. Tuite, 80 Mich. 218; 45 N. W. Rep. 88; 7 L. R. A. 824.

[9] Day v. Button, 96 Mich. 600; 56 N. W. Rep. 3 (1893).

[10] 43 Mich. 534.

[11] 78 Mich. 363 and 80 Mich. 218.

relator of books and office. We assume that, the question of the right to use the same being settled, the parties can adjust their differences."

§ 116. **Construction of statute in New York.** The laws of New York make it the duty of the register of deeds to permit all persons to have free access to the books and records of his office for search at all reasonable times, and to exhibit them to persons desiring to make such searches. It was held that where the register refused to permit such examination to be made by an abstract maker for the purpose of making a set of tract indices, mandamus would be issued compelling him to permit it to be done.[12] Where the statutes give a right of free inspection of the records to all persons at proper times, and he refuses to act in compliance with the law, a peremptory writ will issue requiring him to permit such inspection and examination to be made by a title company and its agents, and to permit the work to be done by such a number of persons so employed as in the exercise of his unbiased judgment and discretion can be permitted at the same time to pursue their searches in the office, without depriving other persons equally entitled to make searches of title of the convenient opportunity for so doing, and under the restrictions and limitations imposed by the law regulating the duties of his custodianship.[13]

Relator moved for a peremptory mandamus commanding the register of deeds to permit more than three of its employees to make searches and copies of records in a certain department of the office, for use in its business of making abstracts of title. The statutes of New York provided that such records should "at all proper times be open for the inspection of any person paying the fees allowed by law." The court said: "These records are, therefore, public records which every person has the right to inspect, examine and copy at all reasonable times in a proper way, and the register cannot deny access to his office or to the books for such purposes to any person coming there at a proper time and in an orderly manner. But he must necessarily have control of his office and of the records, and must have some discretion to exercise as to the manner in which persons desiring to

[12] People v. Reilly, 38 Hun 429 (1886). High on Extraordinary Remedies, § 43.

[13] People v. Reilly, supra.

inspect, examine and copy the records may exercise their rights. He must transact the current business of the office and allow all persons reasonable facilities to exercise their rights in his office. He cannot give the right to one person or one corporation to occupy his office to the exclusion of others, and each person must exercise his rights in the office consistently with the exercise of similar rights by others. It is clear that this relator could not properly put twenty-five or thirty men into the office and thus block up the office and interfere with the register in the discharge of his duties. He must have some right to say how many persons the relator could send there to work at one time. It was finally agreed * * * that three persons might be placed there to do this work. It was only when an additional man was attempted to be brought in * * * that the defendant made serious objection on the ground that no more than three men representing the companies could be allowed there without interfering with the current business of the office. * * * The relator's right, therefore, to have greater facilities and privileges in the office was not so clear that we can say the court below erred in refusing to issue the peremptory mandamus, which cannot always be demanded as matter of right."[14]

§ 117. **"Any person" includes every person.** A statute of Wisconsin declared that "every....register of deeds....shall keep his office....open during the usual business hours of each day....and with proper care, shall open to the examination of any person all books and papers required to be kept in his office, and permit any person so examining to take notes and copies of such books, records or papers or minutes therefrom; and if any such officer shall neglect or refuse to comply with any of the provisions of this section, he shall forfeit five dollars for each day such non-compliance shall continue."[15] The register of deeds sued out a writ of injunction to restrain the defendant from taking notes, copies and memoranda from the records in the preparation of a set of private abstract books. The court dissolved the injunction and said: "This language, literally construed, certainly includes the defendant. The words 'any person' when so construed are distributive and include every

[14] People ex rel. Loan & Trust Co. v. Richards, 99 N. Y. 620; 1 N. E. Rep. 258 (1885).

[15] § 700 Rev. Statutes.

person. By what authority, then, are we to construe these words as only applicable to a particular class of persons, as for instance, those only who are interested in the particular piece of land, the record of which is sought to be inspected or copied? If so, how is the fact of such interest to be determined—by the applicant or by the register? Is the register to accept without question the statement of the applicant or may he require other evidence? Of course, every statute is to be construed with reference to its object and subject-matter; and in that way it frequently occurs that general words are limited in their operation. Here the subject-matter is the examination of the public books and records in the register's office and the taking of notes, minutes and copies therefrom; and the statute requires the register under a penalty to 'permit any person' to so examine and take notes, minutes and copies. Under such a statute can we say that when a respectable person, in a respectful manner, applies to the register to make such examination, etc., he is to be excluded merely because he does not belong to some class of persons unnamed and undefined in the statute; or if permission is given, is his examination, etc., to be confined to lands in which he or his clients have a present pecuniary interest? As bearing upon the construction of language thus sweeping and imperative, we venture a few citations.[16] In so far as the Alabama and Michigan courts may have indicated that a statute giving certain enumerated rights respecting records to 'any person' is a mere confirmation of a rule at common law, giving similar rights to only a particular class of persons, we must decline to follow them. On the contrary, we must hold that our statute in question extends such rights of examination, etc., to 'any person' applying to such custodian of public records in a proper manner, subject however to the payment of fees when allowed, and such reasonable supervision and control by such officer as are essential to the convenient performance of his duties and the current business of the public. It may be that

[16] Citing Sturges v. Crowninshield, 4 Wheat. 204; Gibbons v. Ogden, 9 Wheat. 217; Harrington v. Smith, 28 Wis. 60; Laughter v. Seela, 59 Tex. 186; Everett v. Wells, 2 Scott N. R. 531. "It is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing." Comstock v. Bechtel, 63 Wis. 661; U. S. v. Wiltberger, 5 Wheat. 95. In re Coy, 31 Fed. Rep. 800.

some more definite regulations should be made in such matters, but that is a question for the legislature and not for us."[17]

§ 118. **Records open to the public.** A statute of Florida provided: "Such records shall be always open to the public under the supervision of the clerk for the purpose of inspection thereof and of making extracts therefrom." In construing this statute the court said: "It will be observed that no limitation is prescribed by this statute as to the extent or duration of the right of access by the public to such records or to the making of extracts therefrom, but on the contrary, its language is emphatic that 'such records shall be always open to the public,' for the purpose of inspection and making extracts therefrom. Some of the cases relied upon by the respondent hold to the doctrine that no person has any such right of inspection and extracting unless he is presently or prospectively interested in some particular title that he desires to investigate. Our statute imposes no such condition or limitation—but its language in the broadest terms declares that such records shall be always open, not to those members of the public only who may be presently or prospectively interested in some particular matter contained in such records, but 'to the public.' Besides this even were we to hold that the lounging loiterer on idle curiosity bent could with propriety be excluded from inspection of such records and from taking extracts therefrom, yet this should not warrant the exclusion of the person engaged in the lawful and highly useful enterprise of compiling an abbreviated abstract of the titles to all the different pieces of real estate in a county, aggregating therein in condensed and convenient form all the matter from all of such records that affects each individual parcel of such real estate. Such abstracts are great time and money savers to the public generally, and are at times quite remunerative to the compilers and owners thereof, and in the enterprise of compiling them the compilers become presently and prospectively materially interested in every particle of information disclosed by such records, whether they be

[17] Hanson v. Eichstaedt, 69 Wis. 538; 35 N. W. Rep. 30 (1887). See also State v. King, 154 Ind. 621; 57 N. E. Rep. 535 (1900). State v. Meeker, 19 Neb. 106; 26 N. W. Rep. 620 (1886).

presently or prospectively interested in the particular properties affected thereby or not."[18]

§ 119. **Records open for making abstracts.** The statutes of Minnesota as amended in 1885 provided for the right to inspect the public records and papers in the office of the register of deeds "either for examination, or for the purpose of making or completing an abstract or transcript therefrom." On the application of an abstract maker for a writ of mandamus against the register of deeds, the court, in construing the amendment of 1885, said: "As the contention of the appellant rests entirely on a single proposition of law, it is only necessary to say that it appears from the petition that the respondents were engaged in the abstract business, preparing and furnishing to any and all persons desiring them correct abstracts of title to any tract of land in Le Sueur county; that in this business it is necessary to make what are called 'tract indexes,' which will show, under the designation of each tract or lot of land, all conveyances or liens affecting the same; and what they claimed was the privilege of inspecting and examining the public records in the register's office, and making abstracts or transcripts therefrom, for the purpose of preparing their 'tract indexes.' The counsel for appellant plants himself squarely upon the broad proposition that respondents are not entitled to any such privileges, because they have no interest in the records which they desire to examine. His contention may be briefly stated thus: (1) At common law no person had a right to examine or copy the records in a public office in which he had no interest, present or prospective. (2) That the statute does not extend this right to others, but merely regulates its exercise by those who already possessed it at common law. Conceding that the rule at common law was as stated, the question is, how far has this been changed by Gen. St. 1878, C. 8, § 179, as amended by Laws 1885, C. 116? In view of its very strong and general language, we are strongly inclined to think that the original statute gave to every person a right to inspect and examine, at all reasonable times, and in a proper way, all public records in the office of the register of deeds, whether he had any interest in them or not, subject, of

[18] State v. McMillan, 49 Fla. 243; 38 So. Rep. 666 (1905).

course, to such reasonable rules as might be necessary to secure the safety of the records, and provided it was done in such a way as not to interfere with the proper performance of the official duties of the register of deeds. But however this might have been, we think the matter is entirely put at rest by the amendment of 1885. It is a matter of common knowledge that at the time this amendment was passed, in a large majority of counties in this state, persons had engaged in the abstract business, and at much expenditure of time and money had prepared, or were preparing, these abstract books or tract indexes. These abstract offices, if properly conducted, are of great public convenience, because for well-known reasons they are usually the only place where abstracts of title can be conveniently obtained. It is essential to the convenient and proper transaction of the business that those engaging in it provide themselves with these tract indexes. This can only be done by examination of the records in the register's office, and making copies or abstracts of the same. The right to do this had been usually exercised and conceded without question. But in some instances the right had been denied, and disputes and even litigation over the matter had arisen between the registers and the abstract men. Under this state of affairs, the legislature enacted the amendment referred to, which throughout bears clear evidence of being intended to define and fix the right of all who might desire to make copies of or abstracts from any of these records. While its operation is not confined to those engaged in the so-called abstract business, yet in its language and general scope it shows that these were prominently in the mind of the legislature. The original statute gave to every one demanding it the right to 'inspect' these records. But as there might be doubt what the right of inspection included, the amendment adds, either for examination or for the purpose of making or completing an abstract or transcript therefrom. As indicating what and whom the legislature had in mind, the act further provides that the county commissioners may permit any person having a set of abstracts of titles to occupy a part of the county building for an office. Taking the whole act together, and construing it in the light of the circumstances existing at the time of its passage and which probably suggested its enactment, we have no doubt that

its meaning and intent is to give to every one the right of inspection of these public records, either for examination, or for the purpose of making or completing an abstract or transcript therefrom, whether they have any interest in such records or not. Of course this right is subject to the limitations expressed or implied by the act. What these are does not concern us here, but we may say generally that it is, of course, subject to such reasonable rules as the register of deeds may prescribe to insure the safety of the public records intrusted to his official custody; and the act expressly provides that it does not give to any person the right to use the records when it would interfere with or hinder the register in the performance of his official duties."[19]

§ 120. **Examination of fiscal affairs of county.** Where the statute provided that all books, papers and documents of the county should be open to the inspection of "any person," it was held that a citizen and taxpayer of the county had such an interest as entitled him to examine the records and papers in the county auditor's office for the purpose of ascertaining the condition of the fiscal affairs of the county. The court said: "The general rule which obtained at common law was that every person was entitled to an inspection of public records, by himself or agent; provided he had an interest in the matters to which such records related. Where, however, the inspection desired was merely to gratify idle curiosity or motives which were purely speculative, the right of inspection, under the common law, was denied. The right to inspect the records in question also impliedly awards to the person entitled to it sufficient time, under the circumstances, in which to make the inspection for the purpose contemplated. We are constrained, therefore, to conclude that the relator in this case, under the facts, is entitled to the inspection which he demands, and also entitled to make such copies and abstracts of the records as may avail him in carrying out the purpose of his examination."[20]

§ 121. **Clerk must certify judgments.** A statute of Minne-

[19] State v. Rachac, 37 Minn. 372; 35 N. W. Rep. 7 (1887).

[20] State v. King, 154 Ind. 621; 57 N. E. Rep. 535 (1900). See Clay v. Ballard, 87 Va. 787; 13 S. E. Rep. 262 (1891).

sota provided: "Wherever information as to the contents of any of said books respecting the existence or docketing or satisfaction of judgment is required for the purpose of making or certifying abstracts of title, any person requiring such information shall apply to the clerk therefor. And said clerk shall at once make search and certify the result of such search under his hand and the seal of said court, giving the name of the party against whom any judgment appears of record, the amount of such judgment and the time of its entry and of its satisfaction" (if satisfied). The relator, an abstracter of titles, tendered the requisite fees and requested the clerk to prepare and furnish a certified transcript of the docket entries of all judgments and satisfactions of judgments docketed in his office during a certain month. During that month seven judgments and one satisfaction of judgment were entered. The relator tendered the requisite fees and requested certified transcripts of each of these, particularly describing them. The clerk refused to comply with such requests and justified his action on the ground that relator proposed to issue such certificates in preparing abstracts of title in his business as an abstracter, and he insisted that the statute just quoted must be taken as a limitation on the right of an abstracter to require the clerk to certify judgments at any time or in any other manner than on each separate abstract of title prepared by him. But the court held that this position was not sound, and that it was the duty of the clerk to issue the certificates which had been requested of him.[21]

[21] State v. Scow, 93 Minn. 11; 100 N. W. Rep. 382 (1904).

CHAPTER XII.

INSPECTION OF RECORDS; RIGHT OF OFFICER TO FEES.

§ 122. **Right of officer to fees.** As we have seen on many preceding pages, there are several things to be taken into consideration in determining whether or not, and the extent to which, one is entitled to inspect, abstract and copy the public records, but the most delicate and embarrassing element which may enter into the question has been touched upon only incidentally and remains to be considered at some length. The right to search the records may be modified or limited to some extent by the right of the officer in charge to the payment of fees. The compensation of the officer may be derived entirely or in part from fees which he is permitted by law to charge for certain services. It is necessary and proper that he should be protected in his right to demand fees under the law. In considering the question of fees of county officers it must be remembered that an office created by a statute is wholly within the control of the legislature, and that the emoluments of the office may be fixed and abolished by the legislature. Records are not kept as a revenue measure for the state or county, and they are not kept for the private gain of the officer in charge of them.[1] They are created as a matter of public policy, for the purpose of giving information as to the state and condition of titles. The fee-bills for services rendered by the officers in charge are merely administrative incidents to the general design of the offices. Nevertheless, a fee-bill is a statute making fees appurtenant to the office, and rights under it are entitled to the protection of the law.

§ 123. **Right of officer to fees from interested person, general law.** In the absence of any provision of the statutes for access to the county records, any person has a right to examine such records as he is interested in, without the payment of fees

[1] In re Chambers, 44 Fed. Rep. 786 (1891).

to the officer in charge. The records are no less free to one who is interested because there is no statute giving the right of free access. They are in fact public records and public property designed for use by those interested in them. The fact that they are constructive notive to an interested person gives him a corresponding right to the information contained in them. The officer may charge an interested searcher under the fee-bill for any service specified in it and required of him, but he is not entitled to charge for the general watchfulness and supervision of the records which it is his duty to keep. In matters pertaining to affairs of business the law does not compel a man to exercise his rights in person, but permits him to act by an attorney or agent, and a lawyer, an abstracter or other agent of a person interested in a title or titles to real estate, may examine the county records for such person, and may make abstracts of them, and if his knowledge of the records is such that he requires no service from the officer in charge other than the general service as custodian of the records, the officer is not entitled to any fee or compensation. Under the general law, where the officer in charge is not required to render any other service than as custodian of the records, an abstracter may examine or copy any records in which his principal is interested, and may search the records in any county office to discover the existence or non-existence of anything of record which may affect the title under examination for his principal, without the payment of fees. Some one of the different elements of this rule is laid down in each of the opinions in cases in which the right of inspection has been discussed. In each individual case the rule has been applied so far as it was involved, and there is no decision in which it has been controverted. But the discussions and arguments in many opinions have tended to confuse rather than to make plain the subject of the right of an abstracter to examine the records, and of the extent to which he may use them. Of these opinions it has been said: "The principle involved has been befogged by many inadvertent statements of judges."[2] These statements, arguments and discussions all tend to insist that the rule must not and cannot be carried to its logical conclusion, and that

[2] State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906).

an abstracter may not make continuous use of the county offices and county records in the prosecution of his business whether as agent or in his own right. In a few cases in which the general law was discussed, the distinction was sharply drawn between an abstracter who represented an interested person and an abstracter who was claiming, as a stranger, the right to examine all the records,[3] but in too many of the cases the arguments, statements and discussions were directed to show the dangers, inconveniences and injustices which would arise if abstracters were to be permitted to examine and copy the public records in the conduct of their business, and the judges who wrote the opinions seemed totally oblivious of the fact that abstracters had the right to inspect the records, and occupy the county offices continuously as agents of interested persons, subject to reasonable rules and regulations.[4]

§ 124. **Abstracter may act as agent for many interested persons.** If a lawyer or abstracter may, without the services of the custodian and without the payment of fees, examine the records and make a complete abstract of title for one interested person, he may do so for several or even for many such persons. He may act for so many such persons that he and his numerous assistants may be continuously in the county offices during the business hours of every business day in the year. A few years ago the work of making abstracts was scattered among the members of the bar, each for his own client examining the title to property in which such client was interested, but the records have become so numerous, and the work has become so complicated, that abstracts may be made with safety only by experts who devote their entire time to the work. But the rule is the same whether those who make abstracts are many or few. As

[3] State v. Grimes, supra. Newton v. Fisher, 98 N. C. 20; 3 S. E. Rep. 822 (1887). Bell v. Title Co., 189 U. S. 131; 23 Sup. Ct. Rep. 569 (1900). Boylan v. Warren, 39 Kan. 301; 18 Pac. Rep. 174; 7 Am. St. Rep. 551 (1888). Randolph v. State, 82 Ala. 527; 2 So. Rep. 714; 60 Am. Rep. 761 (1886).

[4] Buck v. Collins, 51 Ga. 391; 21 Am. Rep. 236 (1874). Bean v. People, 7 Colo. 200; 2 Pac. Rep. 909 (1883). Cormack v. Wolcott, 37 Kan. 391; 15 Pac. Rep. 245 (1887). Belt v. Abstract Co., 73 Md. 289; 20 Atl. Rep. 982; 10 L. R. A. 212; 30 Am. Law Reg. (n. s.) 56 (1890). Webber v. Townley, 43 Mich. 534; 5 N. W. Rep. 971; 38 Am. Rep. 213 (1880).

was said in one case: "The same right of inspection exists whether one is examining only the title to a single piece of real estate or the title to a hundred."[5] It is the permanent and continuous use of the county offices by abstracters, which has caused comment in some cases, and which is the foundation for the charge that abstracters make use of such offices in an unreasonable manner and to an unreasonable extent. Of course it is to be assumed that the abstracter obeys all reasonable rules and regulations and does not interfere with the due administration of the office, and that the references to the unreasonable manner and extent of the use apply only to the continuous occupation of the offices and the number of persons assisting in the work. An abstracter representing interested persons in his work will take less time and space in the office in doing a given amount of examination than his principals would take if they were to attempt to perform such technical and unusual labor, and an abstracter at work in a public office illustrates the economy in the division of labor, in the time and space occupied, in the handling of the records and in the attention to be given to the records by the custodian. If more space and assistants are required in the county offices in order to accommodate the representatives of interested persons in the examination of the records, they should be furnished by the public authorities in order to carry out the design of the establishment of them.[6] In order to effect this design it is necessary that each interested person, either in person or by his agent, shall have every proper facility for examining deeds, mortgages, mechanic's liens, judgments, attachments, taxes, special assessments and any other matters affecting titles to real estate or affecting in any way their property interests.[7]

§ 125. **Abstracter diminishes fees and emoluments of offices.** It has frequently been suggested that an abstracter by the continuous use and occupation of the county offices will diminish the fees and emoluments of the offices and carry on a rival business in the offices of his competitors. Here, again, the distinction must be made. He may not use and occupy the county offices for the examination of records to which he is

[5] Bell v. Ttitle Co., supra.

[6] In re Chambers, 44 Fed. Rep. 786 (1891).

[7] See § 57.

a stranger, without legislation enabling him so to do, but in the absence of a statute excluding all persons from access to and examination of the public records, or giving to the officer the power to charge fees for work not actually done by him, he may represent an interested person in the examination of records, without the payment of fees to the officer. This is the general law as to the inspection of public records by one interested in them, and there is no legal distinction to be drawn between an ordinary member of the public who is interested in the examination of the records, and his agent for the purpose of that examination;—even though the latter be one who makes a business of examining the records for hire. This rule applies even though the abstracter is to certify as to the state of the records, or is to issue a policy of title insurance, and is to charge his principal for the service, for when an abstracter examines a particular title for an interested person, he is subrogated to the rights of his principal whose right to make the examination in person must be admitted. The real occasion and necessity for the examination of the records for the purpose of ascertaining the true state of the title, and the existence or non-existence of liens or incumbrances on it, is not done away with by the mere fact that the agent making the examination proposes, on the strength of the examination, and for a compensation, to certify as to the result of the search.[8]

It has been suggested that an abstracter, occupying continuously a county office in the carrying on of his business as the agent of other persons, is conducting his business in opposition to and as a rival of the officer in the office of the latter. Certainly he must not be permitted to conduct his business in a public office; he may there only conduct the examination which he has been employed to make. System is a requisite of any abstract office, and the taking of orders for abstracts and the management of the business must be done in the office of the abstracter. He may, however, make his examination of the records in the county offices as the agent of an interested person, without the payment of fees, unless the rule has been changed

[8] West Jersey Title Co. v. Barber, 49 N. J. Eq. 474 (1892). This case was reversed in 53 N. J. Eq. 158 (1895) because it was held on appeal that the title company did not represent an interested person and that the principles laid down in the former case did not apply.

by legislation. Without an appropriate statute, a county officer has no exclusive right to search the records in his office, as against an interested person, and has no right to fees from such a person unless he earns them.

§ 126. **Statutes prescribing fees for county officers.** Courts have nothing to do with the mere question of policy in the enactment of statutes. When proper statutes have been passed on a subject, they may be brought before the courts for construction. The legislature has power to enact statutes governing the inspection of public records, and in most states such statutes have been passed. It is for the courts to determine how far they have modified and changed the general law. It is now proposed to state or review certain cases which have been decided under statutes prescribing fees for county officers.

§ 127. **Some statutes which do not change the general law.** Plaintiff's attorney went to the office of the defendant, who was then county clerk, and demanded admission and access to certain records of conveyances and certain other books in the office, for the purpose of examining them. He was refused such admission and access, unless he would agree to pay defendant the same fees for the privilege of examining those records and books as the latter would be entitled by law to charge if he should himself make the proposed examination. The attorney yielded to the demand and paid the fees under protest. Afterward suit was brought by the client to recover back the money. Under an "act to regulate fees," provision was made for the compensation of county clerks for certain services, among which was the searching of the records in their offices, but the compensation was expressly confined to services performed by them. The act respecting conveyances provided for recording deeds in books to be furnished for the purpose, "to which books every person shall have access at proper seasons and be entitled to transcripts from the same, on paying the fees allowed by law." It was held that the provisions for fees could not be extended by construction so as to authorize the demand by the clerk from an interested person for services not in fact rendered by him or his assistants. The court said: "The right of the public to free access to the record carries with it the right to search without charge for the privilege. * * * The searches for which compensation is thus provided

are those which may be made by himself or his assistants. * * * He has no exclusive right to search the records."[9]

§ 128. The code of West Virginia provides that "the records and papers of every court shall be open to the inspection of any person, and the clerk shall, when required, furnish copies thereof, except in case where it is otherwise specially provided." It prescribes in the most elaborate and detailed manner every particular service to be performed by the clerk, for which he may make a charge, and it fixes the amount which may be charged for each service. It makes this allowance: "For a search for anything in his office over a year's standing, twenty-five cents," and "for any copy, if it be not otherwise provided for, three cents for every thirty words." Mandamus was brought by the relator, "as a person, and as commissioner of accounts of said county and as a citizen of said county" to compel the clerk to permit him to inspect the records. The clerk claimed that he was not entitled to inspection unless and until he had paid a fee for it. The court held that if the clerk was requested to make a search, and the matter was of over one year's standing, he might charge twenty-five cents, or if he made a copy of a record, he might charge three cents for every thirty words, but that any person interested was at liberty, whenever he desired to do so, to inspect the books and papers in the office without the payment of fees.[10]

§ 129. The statutes of Nevada contained no provision that the records in the recorder's office should be open to inspection by any person, free of charge. They designated certain fees "for abstracts of title for each document embraced thereby" and "for searching records and files for each document necessarily examined," but contained no words either authorizing or prohibiting the making of abstracts or searches by others than the recorder, or specifying whether he should be entitled to compensation if the work was not performed by himself or his deputies. Under this condition of the statute law, the question was presented to the court as to the extent to which a company engaged in furnishing abstracts and insuring titles

[9] Lum v. McCarty, 39 N. J. L. 287 (1877).

[10] State v. Long, 37 W. Va. 266; 16 S. E. Rep. 578 (1892). See Payne v. Staunton, 55 W. Va. 202, p. 214; 46 S. E. Rep. 727 (1904).

should be permitted to inspect, examine and copy such records, without the payment of fees. It was held that since the filing of instruments for record imparted notice of the contents of them to all persons, anyone interested in them had the right to inspect and copy them or to employ others to do so for him. It was ordered that the recorder permit the abstract company, its agents and employees, free of charge, during regular business hours, to inspect and make memoranda and copies of all files and records in his office, in so far as they related to any current or depending transactions in which the company was employed to make searches, furnish abstracts or insure titles, by persons owning, having any incumbrance or lien upon, or interest in, or seeking to acquire by purchase, bond, contract, attachment, execution, mortgage, lien or incumbrance any interest in property; the examination and taking of memoranda or copies to be made at such times and under such circumstances as would not prevent the recorder or his assistant from discharging their duties, or interfere with the right of other persons to have access to the records. The privilege sought by the abstract company, of inspecting and taking memoranda of all the records, free of charge, for the purpose of compiling an independent set of abstract books and tract indices covering all the property to which such records related, was denied.[11]

§ 130. **Statute, no right to search without payment of fees.** It is within the power of the legislature to place conditions on the right of any person to search the records or to take copies of or memoranda from them. In the cases now to be noted it was held that the legislature had taken away from those interested the right to search the records without payment of fees. The constitution of Maryland provided that the salaries and compensation of clerks of the circuit court, their "assistants and office expenses, shall always be paid out of the fees or receipts of the offices respectively." The code of the state provided that "every clerk shall have the custody of the books and papers pertaining to his office" and "shall give a copy of any paper or record in his office to any person applying for the same, upon being paid the usual fees for transcribing such paper or record." It also prescribed the

[11] State v. Grimes, Nev. ; 84 Pac. Rep. 1061; 5 L. R. A. (n. s.) 545 (1906).

fees which should be paid to the clerk for such copies and for making searches in regard to "any matter above a year's standing * * * if found." An abstract company sought by injunction to restrain a clerk from interfering with it in the making of searches and examinations, claiming the legal right to make such searches and abstracts without the services of the clerk and without the payment to him of any fees. The court, however, held that though the company was entitled to copies of the records and to the information which they contained, yet such copies and information must be obtained through the clerk and only upon the payment of the fees prescribed by law. In rendering its decision the court said: "While our code provides that everyone shall be entitled to copies of the records and to the right of such information as they may afford, yet it provides that such copies and searches shall be made by the clerk himself and on the payment of such fees as the law prescribes. * * * The appellee has the right under its charter to require the clerk to furnish to it transcripts of title and other matters of record, and the right to make searches; but the construction (contention) is that the appellee has the right, through its officers and employees themselves, to make searches and abstracts of title and to do this without paying the fees prescribed by law. There is nothing in the code or charter of the appellee to support this contention." [12]

§ 131. In the absence of a statute on the subject, an ab-

[12] Belt v. Abstract Company, 73 Md. 289; 20 Atl. Rep. 982; 10 L. R. A. 212; 30 Am. Law Reg. (n. s.) 56 (1890). From the statement of facts set out in the report of this case, it is impossible to tell whether the abstract company desired to inspect the records generally, or whether it had been employed by interested persons to make abstracts of title to certain lands. It is merely said that the company "organized and undertook to begin business by offering to search the records, papers, etc., in the office of appellant, but was prevented by him from so doing unless it agreed to pay him the fees he considered he was entitled to under the constitution and laws of the state." The opinion is taken up with a discussion of the dangers and inconveniences likely to arise from permitting the public to search the records and with a pointless reference to several cases. Two of these, Lum v. McCarty, supra, and Brewer v. Watson, 71 Ala. 299, might have been reviewed with profit, and the principles of these cases might have been applied to or distinguished from the case at bar. The exact point of the decision is not clear, but it would

stracter as the agent of one interested may search the records to discover the existence or non-existence of anything on the records which may affect the title which he is examining for his principal, but where there is a statute covering the right to make search and certify to the existence or non-existence of matters of record in a county office, it will control the extent to which such records may be used by an abstracter as such agent. The statutes of Minnesota provide that the books in the clerk's office shall be open "to the inspection of any person demanding the same, free of charge, except in those cases where fees are provided by law." One section of the act provides that "whenever information as to the contents of any of said books respecting the existence or docketing or satisfaction of judgment is required for the purpose of making or certifying abstracts of title, any person requiring such information shall apply to the clerk therefor, and said clerk shall at once make search and certify the result," etc. Another section of the act provides for fees to the clerk for such services. In construing these provisions the court held that the clerk alone had the right to certify abstracts of title as to judgments, and that an abstracter of titles had no right to make searches of the books in the clerk's office for the purpose of making such certificates, and in the course of the opinion said: "It is a conceded fact that the examination sought to be made by relator was for the express purpose of completing and certifying to the existence or non-existence of judgments affecting the title to land abstracted, and was clearly for a purpose not authorized or provided for by the statutes. The relator has the undoubted right under the statutes to examine and inspect the clerk's records for a proper purpose, but no right to do so for the purpose of certifying to abstracts of title."[13]

seem to hold that under the provisions of the code, one interested in the records is not entitled to examine them without the payment of fees to the officer. Maryland statutes, chap. 26, art. 9, acts 1900, provide that all attorneys and their authorized clerks or representatives shall be entitled to inspect and examine as soon as filed for record or at any time afterward, all papers, and to take memoranda therefrom for any lawful purpose, without the payment of fees, and also to examine all the records and indices free of charge, and that all custodians of records are bound to afford full opportunity to make searches and the memoranda for the purpose aforesaid.

[13] State v. McCubrey, 84 Minn. 439; 87 N. W. Rep. 1126 (1901).

§ 132. **Statute, free access, no fees.** Where the right of free access to the records is given by statute, mandamus will lie to compel the officer to permit any person to inspect and take copies of them, even though the officer is allowed no compensation for the time spent in watching the examiner.[14] In one case, in discussing the right of the clerk to fees, it was said: "But the contention is that the office of clerk is not a salaried office; that he is paid by fees; that the fees for searches and certificates thereof have amounted to a very considerable sum, and in this office have resulted in a surplus above the maximum of compensation allowed by law to the clerk, which has gone into the treasury of the United States, whereas, if this plaintiff and other like companies situated in Philadelphia, which are monopolizing the business of examinations of title, should be permitted to make their own inspection and examination of these indices, a large part of the fees hitherto received by the clerk will be lost, his maximum of compensation will not be reached, and there will be no surplus to be paid into the Treasury of the United States. It is insisted that although, by the terms of § 828, [15] the judgment records are open to the inspection of any person without any fee or charge therefor, congress, in directing the preparation of the indices and cross indices, and that they should be open to the inspection and examination of the public, did not add thereto 'without any fee or charge therefor,' and thus manifested its intent that they should not be so used as to interfere with the fees theretofore received by the clerk. We cannot so interpret the statute. If these indices were intended merely for the convenience of the clerk and to facilitate his work, the making of them would

In State v. Scow, 93 Minn. 11; 100 N. W. Rep. 382 (1904), it was said of State v. McCubrey, supra: "That issue involved the right of an abstracter to inspect the books of the clerks of court without the payment of fees." In Minnesota it is the custom to order abstracts of conveyances from abstracters of title, who have free access to the office of the register of deeds under the statutes of the state, but certificates as to judgments and taxes are issued by the officers in charge of the respective records.

[14] Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889). People v. Reilly, 38 Hun 429 (1886). Hanson v. Eichstaedt, 69 Wis. 538; 35 N. W. Rep. 30 (1887). State v. McMillan, 49 Fla. 243; 38 So. Rep. 666 (1905). Clay v. Ballard, 87 Va. 787; 13 S. E. Rep. 262 (1891).

[15] U. S. Comp. Stat. 1901, p. 635.

undoubtedly have been left to his discretion. The convenience of the public and assistance to those interested in the judgments were obviously in the thought of congress, for it declared that they should be open to the inspection and examination of the public."[16]

§ 133. **Under some statutes abstracter making index must pay fees.** The statutes of the different states, giving the right of public inspection of the records, are not expressed in the same language. Each statute must be studied, in order to determine whether under it an abstracter may make an index to the records without the payment of fees to the officer. In one case the act respecting conveyances provided for recording them in books "to which books every person shall have access at proper seasons, and be entitled to transcripts from the same on paying the fees allowed by law." The complainant claimed the right of access, without the payment of fees, for the purpose of making a set of tract indices, and for the purpose of carrying on his business from day to day by inspecting and indexing the instruments as they were filed for record in the office. It was held that under this act every person had a right of access to the records, without the payment of fees to the officer, to examine any title in which he was interested, subject to reasonable rules and regulations, but that an abstract company had no right to such free examination of all the records as would deprive the officer of the emoluments of his office. The court said: "The law makes it the duty of the clerk to take care of the public records in his office, but gives him no special fees for such service. The only compensation to him are the fees he receives in the ordinary course of his business for searches. To extend the right of search by others beyond this limit will deprive the clerk of the only remuneration he can have for the performance of this duty. In the absence of clear expression, it should not be enlarged by construction."[17] In this

[16] Bell v. Title Co., 189 U. S. 131; 23 Sup. Ct. Rep. 569 (1900). See Commonwealth Title Co. v. Bell, 87 Fed. Rep. 19; 105 Fed. Rep. 548; 110 Fed. Rep. 829.

[17] Barber v. Title Co., 53 N. J. Eq. 158; 32 Atl. Rep. 222 (1895); reversing West Jersey Title Co. v. Barber, 49 N. J. Eq. 474; 24 Atl. Rep. 381 (1892).

case and in a subsequent one,[18] the decision in Lum v. McCarty, supra, was approved under the facts governing it, but it was commented on as going to the limit. In these cases attention was called to the fact that in Lum v. McCarty the attorney represented one interested in the records and that he demanded inspection of the records in which his client was interested, and they held that the language of the statute did not extend to persons who were not immediately interested in the records the right to examine them without the payment of the fees allowed by law.

§ 134. A statute provided that all books kept by any public officer should be subject to the inspection of all citizens of the state within office hours, and that "for each inspection, when the clerk's aid is required," a fee of twenty-five cents should be paid. An abstract maker insisted that he had a right under these provisions to make a set of tract indices from the records, and that as he was able to make the inspection and compilation without the assistance of the clerk, he was entitled to do so without the payment of fees to the officer. The court in considering this contention said: "The claim of the complainant to inspect and make abstracts of the clerk's books without the payment of fees, as he proposes to do, is not fairly within that part of the fee-bill which by implication permits any citizen to make an inspection without fee if he does not require the clerk's aid. All laws are to be reasonably construed in view of the object of them and in view of other laws. The object of this permission to inspect without fee if no aid is required from the clerk, is plain. It is contemplated that lawyers, public officers and persons familiar with the books by having frequent occasion to use them may not need the clerk's assistance for the purpose. And by implication this permission contemplates that the clerk shall in such cases make no charge for simply standing by and noticing that no improper interference with the record is had. * * * But the law never contemplated that anyone would make a business of it; spend days and weeks in the office, engaged in an occupation which in our judgment cannot lawfully be carried on except under the immediate observation of the clerk. Fees are given

[18] Fidelity Trust Co. v. Clerk, 65 N. J. L. 495; 47 Atl. Rep. 451 (1900).

for each inspection, each abstract. The law has in view the inspection of one chain of title—the status of one man—and fixes a fee for that. If the inspection of the book does not require the aid of the clerk, he can demand no fee, but it is still his duty to inspect the inspector. In our judgment the rights claimed by the complainant thus to occupy the attention of a public officer, perhaps for weeks together, without fee or reward, is a perversion of the letter of the law intended for one purpose, to another and different purpose not contemplated by the lawmakers, and contrary to their intent. It stands exactly on the footing of the misconstruction mentioned by Blackstone, when it was concluded that because it was unlawful to draw blood in the streets, a surgeon was a lawbreaker who bled a man found helpless therein. If some one familiar with the clerk's office, say an old clerk or a lawyer, whose business required him often to examine the books, were to make a business of it, and sitting at the clerk's door solicit every inquirer to give him a job, he would be no more a perverter of the law and infringer on the rights of the clerk than this complainant proposes to be."[19] The opinion on one branch of this case, Buck v. Collins, has already been commented on.[20] The language of the statute under consideration was: "For each inspection, when the clerk's aid is required, twenty-five cents." The court construed it without giving any force to the words "when the clerk's aid is required" and as if it read "for each inspection a fee of twenty-five cents shall be paid." The words "when the clerk's aid is required" would seem to mean when it is required by the searcher. Watching the records while under examination by the searcher can scarcely be called aiding in the inspection of them.

§ 135. **Under some statutes abstracter may make index without payment of fees.** Under some statutes, where the inspection and taking of memoranda for a tract index is done by the abstracter, his agents and assistants, without any service from the custodian of the records in connection therewith, except that general supervision and watchfulness which is necessary to the protection and safekeeping of the records, the custodian

[19] Buck v. Collins, 51 Ga. 391; 21 Am. Rep. 236, decided in 1874, affirmed in Land Title Co. v. Turner, 99 Ga. 470; 27 S. E. Rep. 727 (1896).

[20] See § 104.

is not entitled to any fees or compensation. A statute of Florida provided, "Such records shall be always open to the public under the supervision of the clerk for the purpose of inspection thereof and of making extracts therefrom; but the clerk shall not be required to perform any service in connection with such inspection or making of extracts without payment of the compensation fixed by law." In passing on the right of the clerk to fees under the statute the court said: "It is contended again that the respondent clerk has the right to exclude the relators and their assistants from examination of the records and from making extracts therefrom unless such relators shall pay him a large amount as his fees and remuneration for such inspection and extracting. We think that the terms of our statute clearly forbid the assertion of any such claim or demand. The alternative writ of the relators alleges that the relators and their assistants have perfect knowledge of the location in the respondent's office of all of the records sought to be examined by them, and that they can and desire to do all of the work of inspecting and abstracting such records themselves without any assistance whatsoever from the respondent clerk or his deputies; that they do not need any such assistance from the respondent and do not ask or desire it. Our statute already quoted in express terms provides for just such a case when it says that "the clerk shall not be required to perform any service in connection with such inspection or making of extracts without payment of the compensation fixed by law." This is tantamount to saying that when he is not required to perform any service in connection with such inspection and extracting, then he is not entitled to any compensation; and nowhere in our statutes is there any fee or compensation fixed or prescribed for the clerk for the bare supervision in his office of parties who may go there themselves to inspect and take extracts from the records without calling upon him for any service or assistance in connection therewith, other than that bare general supervision, observation or watchfulness on his part that it is his duty at all times and under all circumstances to exercise in his office to insure the safekeeping of such records. Such constant supervision, observation and watchfulness over the records is one of the prime duties that he assumes when he takes the office, and the law fixes no fee or

compensation therefor. Our conclusion is that under the terms and provisions of our statute the public generally, including any person or firm who may be engaged in the enterprise of compiling a complete set of abstract books of the titles to all the real estate in a county, have the continuous right at all reasonable hours and times by themselves or their agents to inspect and make extracts from any and all of the public records in the offices of clerks of the circuit courts; and that where such inspection and extracting is done by the parties themselves or by their agents or assistants, without any service or assistance from the clerk or his deputies in connection therewith other than that general supervision and watchfulness as to what is going forward in his office that is necessary to the safekeeping of such records, then such clerk is not entitled to any fees or compensation." [21]

§ 136. An act of congress, August 12, 1848, provides that all books in the offices of the clerks of the circuit and district courts of the United States, containing the dockets of the judgments or decrees of such courts, shall during office hours be open to the inspection of any person desiring to examine the same, without any fee or charge therefor. The act of February 26, 1853, allows the clerk a certain fee for searching the records for judgments or decrees. The act of August 1, 1888, provides that the indices and records of judgments which the clerk by that act is required to keep shall be open at all times to the inspection and examination of the public. In construing these acts it was held that these provisions secure to the public the right to examine these records free of charge, and that the clerk is entitled to a fee only when he is required to make the search himself. The court said: "The language of these statutes is peremptory and authoritative. Their plain meaning and legal effect are in no manner limited, restricted or affected by the provisions relating to the fees of the clerk for searches. If the citizen requires the clerk to make the search, instead of making it himself, the clerk is then entitled for his services to the fees fixed by the statute. He is only entitled to fees when he earns them. He cannot charge the citizen fees for

[21] State v. McMillan, 49 Fla. 243; 38 So. Rep. 666 (1905). See also Burton v. Tuite, 78 Mich. 363; 44 N. W. Rep. 282; 7 L. R. A. 73 (1889).

the privilege of doing for himself what the statute in terms says he may do 'without any fee or charge therefor.' * * * The theory of the bill and the decree is that the government fixed the clerk's fee for searches at 15 cents for each name as a means of revenue to aid in the support of the government, and that it is therefore entitled to a monopoly of the business, and that persons who lawfully obtain copies of the judgment records and the indexes to the same cannot use them in their business of abstracting and certifying to titles, but that every citizen of the state who desires any information with reference to judgments in a United States court must apply directly to the clerk of that court, and pay him for searching for the same. All monopolies are odious, and English history does not furnish an example of one more odious in principle and vexatious in practice than that sought to be established by the bill in that case. Congress never contemplated the establishment of any such monopoly in this business, either for the benefit of the government or the clerk. The acts of 1848 and 1888 are anti-monopoly acts, and took away from the government and the clerk all possible claim to the exclusive privilege of searching these records, and selling the information they contain. The monopoly of authority in business affairs is in every instance and in every degree an evil which can only be established by clear and positive legislation. It will never be presumed nor inferred from a statute capable of any other construction. The decisions on the right of the citizen and abstract companies to inspect and copy the records of the state courts, under the varying statutes of the states, are somewhat conflicting, but it is believed that there would have been no division of opinion on the subject if the state statutes had been as comprehensive and mandatory in their terms as the statutes of the United States." [22]

[22] In re Chambers, 44 Fed. 786 (1891).

CHAPTER XIII.

TRACT INDICES.

§ 137. **Generally concerning tract indices.** In constructing a set of tract indices books are specially prepared. A caption is ruled at the top of each page for the description of the property. There should be about sixty lines to a page, and the page should be ruled off into columns. In these columns is written across the page on one of the lines the document number, grantor, grantee, date, date of record and a short description of the land in each instrument of record affecting the title to the land described in the caption. In some indices there are columns for the consideration and the book and page of the records in which the instrument is recorded. In others there are separate books for the document number and the book and page of the records. On the proper page there is noted the number of any case in court affecting the title to the property described in the caption, together with the title of the suit, the number of any case in the probate court, in which the property is inventoried, and any mechanic's lien claim filed against the property. Certain of the books are devoted to the sections in a particular township and range in the county. Where any part of the section has been subdivided into lots and blocks, the subdivision is laid out, say four lots to a page, and everything, as above, relating to these lots, is posted on the page. Certain pages are devoted to the origin of the titles to the subdivided pieces of land, and any deed describing the property as acre property, or describing all interest in the subdivision, or describing inaccurately land covered by the subdivision, is posted under this "origin." All conveyances which seem to describe subdivided property in such a manner that it is difficult to tell what lots and blocks are affected by it are placed in the "origin." There is also a tract book called the "range," in which are placed conveyances which do not properly describe or locate the property. There is also a book of "irregulars," in which are posted alphabetically all affidavits

as to dower, heirship or kindred matters, where no property is described. If A conveys to B "all his real estate" in the county, not describing it, it will be posted in the "irregulars." Since judgments, taxes and special assessments are of a transitory nature, special tract indices are kept for each of these liens, and are constructed from time to time as they are required. While the rudiments of a system of tract indices are simple, yet, by reason of the errors of conveyancers and the variety and peculiarities of instruments put on record, it is so complicated and involved that one must be specially trained to construct or even to use it. If the guide and key to the records is necessarily so difficult to use, how is it possible to search the records without one?

There are to-day in the older states few counties in which an abstract of title can be made with reasonable convenience, security and dispatch from the indices of grantors and grantees in the recorder's office, and from the general indices in the other county offices. This statement is substantially proved by the fact that in all counties of twenty or thirty thousand inhabitants, and in many having a smaller population, there is at least one set of tract indices to the records. In some states the law provides that such indices may be made by the recorder and kept in his office for the benefit of the public, but as they are expensive to make and maintain, and require skill and technical knowledge, there are few public tract indices in existence. The compiling of tract indices has usually been a matter of private enterprise.[1] In one case it was said that in the abstract business "it is necessary to make what are called tract indices which will show, under the designation of each tract or lot of land, all conveyances or liens affecting the same. * * * It is essential to the convenient and proper transaction of the business that those engaged in it provide themselves with these tract indices. This can only be done by examination of the records in the register's office and making copies or abstracts of the same."[2] They are great savers of time and money to the public generally, and are highly useful in many ways in dealing with real estate.[3] The new method of search by

[1] § 90.

[2] State v. Rachac, 37 Minn. 372; 35 N. W. Rep. 7 (1887).

[3] State v. McMillan, 49 Fla. 243; 38 So. Rep. 666 (1905).

means of tract indices is more convenient and more in accordance with the enlightenment and enterprise of the times than the old method.[4]

§ 138. **A tract index is a necessity.** In a large city from two hundred to four hundred instruments are placed on record on each business day, and when speculation in real estate is active, a greater number may be placed on record every day for months at a time. It is manifestly impossible to make progress in examining such records by means of the general indices of grantors and grantees.[5] In addition to the general difficulties in examining such indices there are many special difficulties. For instance, if a deed to a woman is recorded, her name will appear on the index as the grantee; if she afterward marries and a conveyance from her is recorded, her new name will appear on the index of grantors, and the examiner of the index, who does not know her new name, will be unable to follow the chain of title. And again, when a deed to two or more persons is recorded, the name of the first grantee only will appear on the index; if, when they convey, his name should not come first in the deed, the record of the deed will show on the index only the name of the first grantor, which may begin with a different letter of the alphabet. Deeds assuming to convey an interest adverse to the main chain of title will scarcely be found except by accident. It has been held that where an abstracter finds of record a good conveyance to a person, he is not required to examine prior to the period at which the legal title vested in the grantee, in order to discover whether before acquiring title he had made a conveyance with covenants of warranty to any person, or had made a mortgage on the property.[6] A tract index takes notice of the filing of every instrument affecting the

[4] See Smith v. Lamping, 27 Wash. 624; 68 Pac. Rep. 195 (1902).

[5] All public records in Chicago were burned in the great fire, October 9, 1871. The new records begin from that date. On May 1, 1908, there were in the recorder's office in that city 196 indices of grantors and grantees, and 10,500 record books in which more than 4,250,000 instruments had been transcribed. 68,000 estate had been probated in the probate court, and 42,000 special assessments had been levied. 268,000 suits had been filed in the superior court, and 287,000 suits had been filed in the circuit court. Municipal courts have recently been established and, in some of these, judgments are liens on land.

[6] State v. Bradish, 14 Mass. 296

title to the land in the caption, and will show any such prior conveyance or mortgage at a glance. Many illustrations might be added. The method of preparing abstracts of title from the indices of grantors and grantees is primitive and slow even in small communities, but in large communities it is impossible. We have so far considered only the records in the recorder's office. In order to make abstracts of title we must find out the court proceedings which affect the title under consideration. Unless they are referred to in a tract index in which a minute of them was posted as they were brought, they may never be found. As for judgments, in populous communities they may be found only with the aid of an alphabetical judgment index. Enough has been said and suggested to show that the design and object of the county offices cannot be carried out in these days by the old and primitive methods of search. The possibility of complete and reasonably rapid search is indispensable to effect the design of those offices and to give certainty and security to the community in dealing with titles to land. This can only be attained by means of a tract index. Without it, the records in the county offices are a mass of hidden information, impossible of the use for which, in the days of small things, they were intended. If you ask a county recorder or register of deeds concerning the ownership of a certain piece of property, he will not be able to tell you presently anything about it from the records in his custody, but if you ask an abstracter who has a tract index, he will tell you in a few moments the ownership of the property and the history of the title. A tract index is a guide to every piece of information contained in the records, and is the necessary foundation of the business of making abstracts of title.

§ 139. **A tract index saves time and records.** To make a set of tract indices a number of persons must work for some time in the county offices. While this force is at work examining and posting the records systematically, one after another according to their numbers and dates, there is necessarily much handling of the books and papers. But after the indices are complete, they enable the abstracter to find at once the book and

(1817). McCusker v. McEvoy, 10 R. I. 610 (1874). Dodd v. Williams, 3 Mo. App. 278 (1877). Rawle on Covenants of Title (5th Ed.), § 259. See § 6 et seq.

page which he desires to inspect. He is able to make his examination in a short time and with little handling of the records. He will consume a minimum of the time of the officer in charge of the records. The demand for abstracts of title is not affected by anything except the number of dealings with lands by way of sale, mortgage or court proceeding. Where persons make abstracts without the help of a tract index, they will necessarily find the copies of the required instruments slowly from the general indices, and will take much more of the time and attention of the custodian and his assistants in preparing a given number of abstracts of title than an abstracter with a tract index will take in preparing a like number. Such an index saves the time of the buyer and the seller of real estate, the mortgagor and the mortgagee, the abstract maker and the officer in charge of the records. It drives out of business those who make abstracts of title in the old methods of search, but in doing so it concentrates the work in the hands of a few persons who become skilled in the business and in the handling of the records. The use of an index tends to protect and preserve the public records.

§ 140. **Discovery, production of tract indices in court.** Certain books of the records of a county,—records of deeds and mortgages, an execution docket, a homestead record book and a minute book of the superior court,—were lost, stolen or destroyed. The legislature of the state passed an act for the establishment of copies or substantial copies of these books, and provided for such orders and proceedings as might be necessary for such purpose. One section of the act read as follows: "It shall be lawful for said court, or the judge thereof in vacation, in all cases where he shall deem it proper and necessary so to do, to appoint an auditor, whose duty it shall be to hear evidence, and who shall have power to summon witnesses and compel the production of books and papers under such rules and regulations as are now practised in courts of law in this state, and he shall make his report to the court of such copies of such lost, stolen, mutilated or destroyed copies, and such report when filed shall be acted on by the court and made the judgment, unless objection be filed to the same or some part thereof as being incorrect, which objection, if any, shall be heard and determined by the court without the intervention of a jury." An auditor

was appointed by the court, who reported later that he had given public notice to all persons having any deeds, mortgages, etc., recorded in the books mentioned, to file them with him for the purpose of having them recorded again, but that few instruments were brought to him in response to the notice. Afterward a subpœna duces tecum was issued and served on the secretary of a title company, requiring him to appear and testify, and to bring with him all the abstract books of the corporation in which appeared any entries relating to the records in the lost record books of deeds and mortgages. The secretary made a formal answer setting forth the reasons why he declined to bring the books before the auditor. These reasons were substantially approved by the court in that part of the opinion which is presently to be quoted. The court held that a title company may not be compelled by such a writ, served on one of its officers, to make discovery of the contents of lost public records, where the pleadings for the purpose do not allege or set out anything whatever as the specific contents to be proved. As to the right to compel the company to produce its books the court said: "These abstract books called for by the subpœna came into existence as the result of private enterprise and labor, and were afterwards purchased by this private corporation at great expense. They are its private property and are used by it in the conduct of its corporate business. They have never been published. Their contents are kept secret, except as disclosed, piecemeal, in furnishing to applicants therefor abstracts of title relating to specified parcels of real estate; and the furnishing of such abstracts is carried on as a business for pay and profit. The value of the books consists mainly in the secrecy of their contents. Were the information which they afford accessible to the public by other means, the demand for it through the one source now available would be diminished, if not destroyed. The monopoly enjoyed by a closely sealed intelligence office would be broken, and the losses inflicted by free competition would be instantly felt in the exchequer of the establishment. There can be no doubt that the corporation has a vital interest in maintaining the secrecy of these books as a repository of valuable information. And certainly its secretary is under a duty, both legal and moral, not to aid in killing the goose that lays the golden egg if he can help it. His claim of privilege is

therefore as meritorious as if his own personal interests were involved. We think the claim protects him and that the auditor ruled correctly in so holding."[7]

§ 141. **Right of county commissioners to establish indices.** Where the legislature of a state describes the system of indexing records to be followed by certain county officers throughout the state, it is not permissible for the county commissioners of a county to expend public money to maintain other and different systems, such as tract indices.[8]

§ 142. **Right to copy compiled work, tract indices, etc.** What has heretofore been said in this treatise concerning the right of inspection of public records relates to such records as are in the official custody of a public officer and are constructive notice of the contents of them. When pursuant to authority conferred on it by statute, a county undertakes to make abstracts of title for the public for hire, it does so in the exercise of its private and not of its governmental functions. While by statute the public may be entitled to free access to records of a public nature, such as are constructive notice or are required by law to be kept by the recorder, yet, in the absence of express statutory permission, a member of the public may not copy tract indices and abstract books used by the recorder in connection with the private business of the county as an abstracter of titles, where the copying of such indices and books would result in competition with the county in the business of making abstracts. If a person preparing to engage in the business of making abstracts of title may avail himself of the compiled work done by the county in its capacity of a private corporation and may copy it into his own books, he will acquire without compensation a valuable property which has cost the county a large sum of money, and will be enabled at once to enter into competition with the county in serving the public. Where the statute provided that "all records, indices, abstract and other books" should be open to the inspection and examination of the public, and that all persons should "have the right to take memoranda and abstracts thereof without fee or reward," it

[7] Ex parte Calhoun, 87 Ga. 359 (1891).

[8] Smith v. Lamping, 27 Wash. 624; 68 Pac. Rep. 195 (1902). Dirks v. Collin, 37 Wash. 620; 79 Pac. Rep. 1112 (1905). See People v. Nash, 62 N. Y. 484 (1875).

was held that even if the statute gave all persons the right to "take memoranda and abstracts" from the tract indices and other books used by the county in conducting an abstract business, it did not give them the right to copy such indices and books into other books. Such indices and books are to be distinguished from the books necessarily and usually kept by the recorder and, strictly speaking, have no relation to the duties of a recorder as a public officer.[9]

§ 143. **Tract indices are not taxable.** A set of tract indices to the public records have no intrinsic value and are not taxable. In so determining the court said:—"The constitution requires assessments to be made on property at its cash value. This means not only what may be put to valuable uses but what has a recognizable pecuniary value inherent in itself and not enhanced or diminished according to the person who owns or uses it. The court below found expressly, and could not have found otherwise, that these abstract books have no intrinsic value. They are only valuable for the information they contain, and that information is conveyed by consultation or extracts. Their value is only kept up by their completeness and continued correcting. The sale of a complete copy would practically destroy the value of the books in the hands of the plaintiff. So a similar compilation by any one else would have a like result. The value of the books except as used is nothing. They resemble in nature, if not precisely, the possessions which are consulted by any person who makes an income from his acquired knowledge, whether scientific or otherwise; as a surveyor's notes, an author's memoranda, a druggist's recipes and many analogous things. They may be and are very serviceable, but they are not things that the law has made subject to seizure or assessment. If these books were taxable as personalty they could be made liable to satisfy it, and this in our opinion can not be done."[10] In 1899 the legislature of Michigan passed an act making tract indices liable to seizure and sale on execution in like manner as other personal property. It

[9] Davis v. Abstract Construction Co., 121 Ill. App. 121 (1905). See Fidelity Trust Co. v. Clerk, 65 N. J. L. 495; 47 Atl. Rep. 451 (1900). See § 83.

[10] Perry v. The City of Big Rapids, 67 Mich. 146; 34 N. W. Rep. 530; 11 Am. St. Rep. 570 (1887).

was afterward held that this act did not make a set of tract indices subject to taxation. The court said: "Making it subject to levy upon execution does not render it subject to taxation; so making it subject to taxation would not render it subject to sale upon execution."[11]

§ 144. **Tract indices are taxable.** A set of abstract books, although compiled in the form of abbreviations and cipher, so as to be intelligible to but few persons, is personal property having a money value and is subject to taxation under the laws of the state of Washington. In so holding the court said: "The only question involved in this case is whether a set of abstract books is included within the term 'personal property' for the purposes of taxation. The proof shows that the information contained in the books is largely in the form of abbreviations and cipher peculiar to that particular set of books and only five persons understood them, as far as was known to the manager and secretary of the company, that no information could be derived from the books except by an expert in that line of business, and that it would be necessary for him to understand such abbreviations and cipher. It is contended that the books were of no value to the public or to any one who did not understand them; that while the books originally in blank form were of some value, the fact that they contained such writings had destroyed this value even, and that they are not assessable for the purpose of taxation. There was some proof however to show that certain maps connected with the business had a general value to the extent perhaps of $100. We are of opinion that the property was subject to taxation. The fact that it requires the services of an expert to obtain the necessary information from the books may detract from their value in a general sense, but would not deprive them of all taxable value."[12] Under the law of Iowa, making all property, whether real or personal, subject to taxes, except such as is therein expressly made exempt, tract indices to the real estate in a county, which are capable of being used by persons of ordinary intelligence as a means of profit, and which have a market value, are not exempt from taxes because of their manuscript character. In

[11] Loomis v. City of Jackson, 130 Mich. 594; 90 N. W. Rep. 328 (1902).

[12] Booth, etc., Abstract Co. v. Phelps, 8 Wash. 549; 36 Pac. Rep. 489 (1894).

so holding the court said:—"The books are admitted to have an actual market value, and, for the purpose of learning the title to lands in Decatur county, they can be used by any one of ordinary intelligence and ability. It is also admitted that they contain a true, full and complete record of the title of each tract of land and town lot in Decatur county, Iowa. The books have an admitted value of $6,000; have changed hands as articles of commerce; are kept in an office building as the possession of a person for profit by the receipt of fees for transcripts of their contents; and their value consists chiefly in their being correct compilations from public records and not because their contents are emanations from the learning or genius of an individual. * * * These abstract books answer the original design, are complete, and placed before the public for use and profit. They were not made for publication in a general sense. Such publication would defeat the very purpose of their production. Their value consists chiefly in their contents being kept from the public. They are the means, in a sense the instruments, for carrying on a business; as much so as are the tools or machinery by which the artisan plies his calling. * * * It may be said that the value of books in general depends on the information they contain and that such information is derived from consultation; but for such abstract reasons they are no less property subject to the operation of the revenue laws of the state."[13]

§ 145. **Sale of tract indices on execution.** In an early case it was held that a set of abstract books, containing memoranda compiled from the public records and so arranged as to facilitate the examination of titles to real estate in a certain county, were not subject to seizure and sale under execution. The court held that the right of the proprietor of unpublished manuscripts, such as tract indices, to publish them or keep them back from publication is not only a property right, but one which is purely incorporeal and attended with considerations of a nature entirely different from any involved in other rights, and in the course of the opinion, said: "The right is one which is entirely independent of locality and belongs essentially to the owner wherever he may be, and in whatever locality one or more copies

[13] Leon Abstract Co. v. Equalization Board, 86 Ia. 127; 53 N. W. Rep. 94; 41 Am. St. Rep. 486 (1892).

of the writings may be found. The value, when it is considered at all in a pecuniary sense, depends on the information or interest of the composition or document, and not on the particular bundle of paper which records it. * * * No law can compel a man to publish what he does not choose to publish."[14] Where the statutes exempted from execution the necessary tools and instruments of any person, used and kept for the purpose of carrying on his trade or business, it was held that abstract books kept by one who had no other business than that of an abstract maker were exempt from execution. The court said: "The exemption laws must receive a liberal construction for the purpose of carrying out their object and design, and one of the main objects of exemption laws is that any person shall have the means of carrying on some useful business and thereby of obtaining an honest livelihood."[15] Where the statute enumerates the classes of persons whose books shall be exempt from execution, the debtor must be one of the classes of persons named in the statute, in order that his books may be exempt. An abstracter does not come within the definition of a mechanic.[16]

§ 146. **Indices taken on execution may not be copied.** In one case in which the right to levy on a set of tract indices was not discussed, it was nevertheless held that, when such a set of books is levied on under execution, the owner's exclusive right to the information contained in the books is not divested until a sale of the property. The levy merely suspends his right to possess, use and dispose of the books, and on payment of the debt the owner has the right to have all of the books returned to him in exactly the same condition as they were when seized, usual wear and tear incident to removal and preservation being excepted. The sheriff has no right to make or to dispose of copies of the books. In passing on these matters the court said: —"I think the learned judge certainly goes a great way beyond the law in holding that a sheriff may use property which he has possession of under a levy for his own advantage, or that he can do anything concerning it save to preserve it for the best interests of the debtor and creditor, for whose mutual benefit he holds it. I do not think the debtor loses any rights in his

[14] Dart v. Woodhouse, 40 Mich. 399; 29 Am. Rep. 544 (1879).
[15] Davidson v. Sechrist, 28 Kan. 324 (1882).
[16] Tyler v. Coulthard, 95 Iowa 705; 64 N. W. Rep. 681 (1895).

property when it is levied upon, save and except the immediate possession and control of it; and on payment of the debt he has the right to have it returned to him in exactly the same condition in which it was at the time of the seizure, usual wear and tear of removal and preservation only excepted. The sheriff has no personal right of possession; his possession is that of the law, whose agent he is, and he has no right to use the property or profit by its possession in any way whatever. In the interval between levy and sale the debtor is not divested of his ownership in the property, but the incident of title, the right to possess, use and dispose of the property, is suspended only, which he may regain at any moment by paying the debt. There can be no doubt that the sheriff was guilty of a flagrant violation of his duty in copying the plaintiff's books, and that an action will lie against him for the damage the plaintiff has sustained by reason of his misconduct. It was a proper case for the equitable intervention of the court by injunction to restrain the issuing of the copies by sale or otherwise to the damage of the plaintiff."[17]

§ 147. **Mortgage on indices may be foreclosed.** The owner of a set of tract indices who so far treats them as valuable property as to secure a loan by the execution of a chattel mortgage on them, is estopped to assert, in a proceeding to foreclose the mortgage, that the records would be of no value in the hands of anyone but the compiler.[18]

[17] Banker v. Caldwell, 3 Minn. 94 (Gil. 46), (1859).

[18] Washington Bank v. Abstract Co., 15 Wash. 487; 46 Pac. Rep. 1036 (1896). See Freeman on Execution (2nd Ed.), § 110.

CHAPTER XIV.

TITLE INSURANCE.

§ 148. **In general.** A contract of title insurance has been defined as "a contract to indemnify against loss through defects in the title to real estate or liens or incumbrances thereon."[1] Another writer has said: "Title insurance is an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the insured in a specified amount against loss through defects of title to real estate wherein the latter has an interest, either as purchaser or otherwise."[2] Title insurance is designed to indemnify the insured from loss or damage arising by reason of defects in the title existing at the date of the issue of the policy. The defects against which it insures must antedate the policy, and those arising after the date of the policy are not covered by it. Other kinds of insurance are intended to protect the insured from loss on account of certain contingencies, casualties and events which may take place after the issue of the contract and during its continuance. As has been said many times, other insurance begins where title insurance ends, namely, at the date of the policy. A glance at the definitions above given will disclose that they are lacking in one of the essential characteristics of title insurance. They ignore the fact that the defects insured against must exist at the time the contract is entered into. Title insurance is a contract to idemnify the insured, within a specified amount, in his interest in real estate as therein set forth, against loss by reason of defects in the title existing at its date. A title policy applies to a situation as it then exists.

§ 149. **Title insurance is not a wager.** In its distinctive features title insurance is not a wager or the taking of a risk on the validity of the title. The theory of such insurance is that no known risks are taken. The muniments of title are carefully

[1] 1 Cooley on Insurance, p. 12.
[2] Frost on Guaranty Insurance, § 162.

examined by skilled lawyers, and the exact condition of the title is stated. The title company sets forth in the policy the state of the title and agrees to indemnify the insured if it is mistaken in the matter and loss results to the insured in consequence of the mistake. Of course there is always the possibility of mistake in questions of title. Men learned in the law of real estate may differ as to the legal effect of instruments or court proceedings found in the chain of title. There is also a possibility that the abstract of title, which is the basis of the opinion as to the state of the title, may be imperfect or erroneous. If there were no risks in accepting titles to real estate there would be no such thing as title insurance, for insurance suggests the idea of protection from risk. Title companies adopt a system of carrying on their business, rely on the ability and skill of their officers and examiners on the questions involved in titles which are submitted for insurance, select those titles which they are willing to insure, refuse those which they consider dangerous or unsatisfactory, and take the risks which are incident to their business. The lawyer who passes on a title covenants with the employer that ordinary skill and diligence has been exercised in the work performed, but in insuring a title a company goes far beyond this. It not only guarantees the correctness of the certificate of title set forth in the policy, but it agrees to indemnify the insured in case of loss by reason of any defect in the title as stated. This contract, while containing little of a speculative nature, has in it enough of that element to make it highly desirable for those who deal in lands, and who know little or nothing about the complicated and intricate laws of real estate. It relieves the sense of anxiety as to possible mistakes in the examination of the public records, gives security against errors of judgment on any legal questions which may be involved in the title, and covers the forgery of instruments in the chain of title. It has not supplanted covenants of warranty of title in deeds of conveyance, but in some respects it stands to the title in a relation similar to such covenants. It is used by the public, in addition to such covenants, as a safeguard and protection in dealing with titles to land, and the experience of the past twenty-five years, and the great development of the business of issuing such contracts, have demonstrated thoroughly the need and benefits of title insurance.

§ 150. **Guaranty of correctness of certificate of title,—title insurance.** There is a difference between a guaranty of the correctness of a certificate of title and a policy of title insurance. Where a company makes a certificate of title to a certain piece of land, issues it to a person, his heirs and assigns, and guarantees it to be correct, it is a guaranty of the correctness of the certificate. On the execution of such a contract, if the title to the property is not as stated in the certificate, there is an immediate breach of its conditions, and suit may be brought against the company. But a policy of title insurance is a contract of indemnity against loss which may arise by reason of defects in the title as stated, and under such a contract actual loss must precede the bringing of a suit and the fixing of compensation or damages. The difference between these two forms of contract lies in the time of the breach of the contract and the consequent running of the statute of limitations, and in the rule of damages, but where the holder of a guaranteed certificate, within the period of the statute of limitations, pays out money to perfect his title or to pay off a prior lien, and brings an action on the guaranty of the certificate, the action will proceed in all respects as an action on a policy of title insurance.[3] Where a certificate of title issued to the owner of the fee provides that the guarantor shall not be liable for damages to exceed a certain amount, that it will defend the guarantee or his heirs against every "claim adverse to the title guaranteed," that, if a loss under the certificate is less than all the land, the company shall be liable only for a proportionate share of the loss, and that the guarantor, in case it makes payments under the certificate, shall be subrogated to the rights of the guarantee, the instrument is a title insurance policy. It is not rendered a mere guaranty of the correctness of the certificate by the additional provision that the company guarantees the certificate to be correct.[4]

§ 151. **Contract is founded on examination of abstract of title.** A contract of title insurance is based on the examination of the public records and on the examination of an abstract prepared from the records. If there is a defect in the abstract, it may appear in the policy. While a title insurance company in practical effect insures the sufficiency of the abstract of title,

[3] See §§ 32, 36.

[4] Purcell v. Land Title Co., 94 Mo. App. 5; 67 S. W. Rep. 726 (1902).

on which it is founded, the contract to search the records is distinct and separate from the contract of insurance. Under a contract to search, the company is liable for damages which its negligence may have imposed on the employer, but an action on a contract of insurance is based on the fact that loss has occurred because the company did not correctly state the condition of the title. Under a contract of title insurance, no question of negligence in searching the records can arise, and the doctrine of skill or negligence has no application. In a suit on a policy it cannot be shown that the company was negligent in searching the records. The action is not based on that ground, and a plaintiff may not plead on one cause of action and recover on another.[5]

§ 152. **Extra premium for a known risk.** The premium or compensation paid for title insurance is small as compared with premiums paid for other insurance. This arises from the fact that title insurance is not of a speculative nature. Sometimes questions of difficulty and uncertainty are found in a title, which may give rise to litigation, though not to a probable defeat of the title. These may be of such a threatening character as to cause the company to refuse to issue a policy until after an appropriate legal proceeding has been carried out, curing the defects, or they may be the basis of negotiation for an increase of premium for a known risk. This form of insurance against known risks is urged on title companies by the vendors of lands and real estate agents, who are anxious to carry out their sales, and by mortgagors who are anxious to obtain money on the security of their lands, but title companies are inclined to avoid such risks. Some companies insure the marketability of the titles covered by their ordinary policies, but even when this is not the case, a company desires to have it known and understood that its policies of insurance are also certificates that titles are as stated, without undisclosed defects or irregularities. If the purchaser of property, desiring to use and occupy the premises for a number of years, is willing to take the title when the uncertainties or irregularities are explained to him, the company may

[5] Trenton Potteries Co. v. Title Guar. Co., 176 N. Y. 65; 68 N. E. Rep. 132 (1903). Minnesota Title Co. v. Drexel, 70 Fed. Rep. 194; 17 C. C. A. 56; 36 U. S. App. 50 (1895). See Trimble v. Stewart, 35 Mo. App. 537 (1889).

properly assume the risk if it desires to do so. Where, however, the property may soon be sold again, situations of embarrassment are likely to arise from the taking of such risks. In cases of mortgage policies, where the insurance is only for the period of the existence of the debt and the amount of the policy is only about half of the appraised value of the property, it might seem to be natural and appropriate to pass questions of irregularity and uncertainty, pertaining to the quality and not to the validity of the title. But on non-payment of the debt and consequent foreclosure of the mortgage, the lender of the money, unless the difficulties in the title were originally explained to him, may well complain that in relying on the policy he has been burdened with a title of doubtful merchantability. Experience has taught title companies that the assumption of known risks for increased premiums frequently interferes with the dignified and orderly conduct of their business.

§ 153. **Nature of defect which must exist at date of policy.** A policy of title insurance covers defects in the title at its date, not excepted by its terms. It is not necessary that the defect should be in actual existence at the date of the policy in order to hold the company in case of a subsequent loss, but it is sufficient if there is an inchoate or a potential defect then in existence, which afterward, by the happening of some event or the act of some person, becomes a reality and imposes a loss on the insured. If, for instance, a company, by the assumption of a known risk, or, what is much more likely, by mistake, should insure that an absolute fee title passed to A under a will probated before the date of the policy, and it should afterward be determined that, by reason of the subsequent happening of a certain event, the title of A had failed or had been diminished, the company would be liable. In such a case the title of A under the will contained a potential defect at the date of the policy; the subsequent happening of the event ripened it into an actual defect, and, as such, it related back under the will to the date of the death of the testator. The most familiar example of an inchoate lien which may afterward arise and acquire an actual existence prior to the date of the policy is a mechanic's lien. A mechanic's lien law usually provides that, when a notice of a lien is filed, the lien shall relate back and attach as of the date of the commencement of the work, or as of the date of the

first delivery of material for the building. If a policy is issued while a building is under construction, there may be no mechanic's lien of record, but afterward such a lien may be filed, which will relate back to a time prior to the date of the policy, and bind the company under its contract of insurance.

§ 154. **Forms of contracts of title insurance.** Some title policies use the word "insure" and others use the word "guarantee," but where the substance of the contracts is the same, there is no distinction to be made between them on account of the use of these terms. Each title company has its own forms of contract. Some contracts merely guarantee the correctness of the certificate of title; some "certify and guarantee" that the insured has a certain interest in the title; some insure that the title to the property is marketable and merchantable, while others expressly declare that the company shall not be liable in any event for loss arising from the refusal of any person to carry out any contract to purchase, lease or loan money on the title; some fix a maximum amount of indemnity which may be recovered, and others guarantee the title generally. In some policies the duration of the contract is limited to a certain number of years. Some contracts provide that, on notice, the company will at its own cost defend any legal action in which the title prior to the date of the policy is attacked. Some companies issue different forms of policies at different rates of compensation. The variations in the terms of policies arise out of different local conditions of public records, and out of the demand of the public for particular forms of policies, as well as out of the opinion and judgment of the officers of the company.

§ 155. In speaking generally of title insurance, reference is made to the contract of indemnity, by which the company obligates itself to pay for any loss by reason of defects in the title, or of prior liens or incumbrances on it. It is usually accompanied by an agreement on the part of the company to defend the insured against any attack on the title for matters arising prior to its date. It is sometimes accompanied by an insurance of the marketability or merchantability of the title. Under this latter insurance, if the insured, in the ordinary course of business, contracts for a loan on the property, or to sell it, and the title is refused for reasons in existence at the date of the policy, the company will test its validity in court at its own expense,

and, if defeated, will pay damages or make the loan, or when the insured has contracted in good faith to sell it, will take the property at the contract price.

§ 156. **Two kinds of title policies.** Generally speaking, there are two kinds of title policies, an owner's policy, sometimes called a fee policy, and a mortgage policy. These are divided into forms to meet special conditions. As to fee policies, the owner is insured in his own title; the purchaser is insured in the title of his vendor at the date of the purchase; there is a form for insuring a corporation and its successors instead of an individual, his heirs and devisees; there is a form for insuring the purchaser at a judicial sale when there is a period of redemption from such sale. As to the mortgage policies, one form insures the mortgagee; where a trust deed is used to secure the debt, one form insures the trustee named in it, for the use and benefit of the owner of the indebtedness, and another insures the owner of the indebtedness secured by the trust deed, either by name or by the general description. Sometimes it requires some ingenuity to construct a policy to cover the insurance of some special interest. In the matter of an incumbrance by way of mortgage, it is to be observed that the company does not insure that such an incumbrance is a first or other lien on the premises. No such direct language is used in the policy. It sets forth the state of the title with reference to the instrument in question and describes it as a valid instrument, without, however, insuring that there is a valid indebtedness secured thereby. Whether the mortgage or trust deed described in the policy has actually attached as a lien on the premises depends on matters outside of the record of title. If the supposed lender has obtained the evidences of indebtedness and security by fraud, or if he has not paid out the money on account of them, the instrument is not really a lien, and a title company does not insure as to these personal matters which the lender must be responsible for. When he has done all that is required of him as a mortgagee, the contract will protect him against any prior defects in the title or any prior incumbrances, and against any invalidity of the instrument securing the indebtedness.[6]

§ 157. **Application for a policy.** A fee policy is usually

[6] See appendix, form C.

issued on a written application by or on behalf of the person insured, and it usually provides that the application shall be held, against all parties claiming under it, to be a warranty of the facts therein stated. It is fair and proper for a title company to inquire into the conditions surrounding a title which it is asked to insure, and it is just to require of one holding the title, or about to acquire it, that he give accurate information concerning those conditions. With regard to mortgage policies, however, the situation is somewhat different. The lender is not supposed to know anything about the title. He examines the property itself and passes on the sufficiency of the security for the amount to be loaned, and he requires the borrower to furnish him with a title policy, in order that he may be protected in the validity of the mortgage or trust deed, and in the quality of the title to the property. The borrower must answer the questions set out in the application, and manifestly it would be unfair to require the lender to be bound by the truth of the answers. For this reason mortgage policies usually make no reference to the written application, and title companies take the risk as to the truthfulness of the answers of borrowers in applications for mortgage policies. Persons often seek fee policies because of some known question or defect in the title, and it is proper that inquiry on this point should be made by the company, so that particular attention may be directed to the questions involved. But an application for a mortgage policy is usually made by the borrower because the lender demands the policy as a condition to the making of the loan, and where the owner is seeking insurance for the benefit of the lender, and not for his own protection, it is not so likely that there is any known question in the title. Mortgages are usually for about half the value of the property, and in case of loss on a mortgage policy, the company may have some salvage out of which it may recoup its loss, or a part of it.[7]

§ 158. **Application, representations and warranties.** The same general principles apply to applications for title insurance, which apply to applications for other kinds of insurance. There are hundreds of cases in the books, which treat of the effect on the contract of answers made in applications for insurance. Many of these cases may be applied to policies of title insurance.

[7] See forms of applications in appendix.

When the truth of the answers is warranted in the contract, but the company knows when it issues the policy that certain answers are false, it must be held to have waived the falsity of such answers. A company may not issue a policy which it knows to be void in its inception.[8] A policy of title insurance referred to a written application and provided that "any untrue statement or suppression of a material fact affecting the title, or any untrue answer to questions contained in said above application, by the insured or his agent, shall avoid this policy, excepting as against a mortgagee not privy thereto." The application contained this provision: "It is agreed that the following statements are correct and true, to the best of the applicant's knowledge and belief, and that any false statement or any suppression of material information shall avoid the policy." Questions by the company and answers by the insured followed this provision, and among them was this: Question. "Last price paid for the property?" Answer. "$11,000." The application was signed by the insured, and the policy was issued to him. The insured borrowed $4,500 on the property, and the title policy was assigned to the mortgagee with the consent of the company. The deed to the insured was a forgery, and the insured, instead of having paid $11,000 for the property, had given to the impersonator of its owner, as the consideration for the supposed conveyance of the property, $3,000 in cash and some mining stock of little or no value. The title company, on learning these facts, took up the note of the mortgagee, but declined to pay anything to the insured, on the ground that he had made a false answer to the above question as to the price which had been paid for the property. The court held that the answer was a warranty, and that, being false, it avoided the policy. The court said: "The 'last price' referred to in the application, question and answer, was the price paid by plaintiff to the person who executed the deed to him. The question called for a statement of the actual, and not merely a nominal price,—of the price in money or money's worth; and from the answer the defendant could understand nothing else but that the sum stated was the actual money price. The evidence of the plaintiff showed beyond dispute that in the deal

[8] Quigley v. St. Paul Title Co., 60 Minn. 275; 62 N. W. Rep. 287 (1895).

with the person who personated Uihlein, and which resulted in the deed to plaintiff, no money price was agreed on; that it was not a sale for money or money's value, but that the plaintiff holding stock in a mining corporation to the amount, par value, of $15,000, but which as the jury find, was of very little value in the market in St. Paul, where the transaction was had, and find also that plaintiff knew it was of little value, he transferred the stock and paid $3,000 in cash for the conveyance. The consideration stated in the deed was $11,000.—at whose suggestion inserted, does not appear. The actual consideration was the stock, of little value, as plaintiff knew, and the $3,000. It is not a case, as plaintiff contends, of a price agreed on for the land, and a subsequent tender on the one part, and acceptance on the other, of property in lieu of money, in satisfaction of such price. It was a trade of the stock and the $3,000 for the land."[9]

§ 159. **Stipulations and conditions of a policy.** The same general rules govern the stipulations and conditions of all policies of insurance. Such stipulations and conditions differ only as the character of the insurance differs. It is competent for the company to insure the title to specific pieces of property on such terms and conditions as may be agreed to by the insured. It may limit its liability under a policy by fixing its terms and conditions in any manner to which the person accepting its policy may agree. When the contract of title insurance has been agreed upon, it is subject to the same rules of construction as are applicable to policies of other kinds of insurance; such a contract is one of insurance pure and simple. In case of doubt or ambiguity in any of its provisions, the contract will be construed most favorably to the insured.[10]

§ 160. **Condition that defect must be established by court.** A condition in a title policy declared that no right of action should accrue "unless the insured has contracted to sell the estate or interest insured, and the title has been declared, by a court of last resort of competent jurisdiction, defective or incumbered by reason of a defect or incumbrance for which the company

[9] Stensgaard v. St. Paul Title Co., 50 Minn. 429; 52 N. W. Rep. 910 (1892).

[10] Minn. Title Co. v. Drexel, 70 Fed. Rep. 194; 17 C. C. A. 56; 36 U. S. App. 50 (1895). Place v. St. Paul Ins. Co., 67 Minn. 126; 69 N. W. Rep. 706 (1897).

would be liable under this policy." This condition has no application to a case where the property is held by another person in actual adverse possession, and the insured has lost it absolutely by reason of the fact that he has not been able to get possession of it.[11]

§ 161. **Condition that there must be an eviction.** A condition in a title policy that "no claim shall arise under the policy unless the party insured has been actually evicted under an adverse title insured against" means that there must be an eviction by process of law taken under legal proceedings. Adjudged cases in actions on covenants of warranty of title as to what constitutes eviction are of little aid in determining whether there has been such an eviction as will entitle the holder of a title policy to recover against the company. The contract of the warrantor is without conditions, but title companies agree to indemnify on certain written conditions. There must be a breach of the express conditions in order to create a liability under the policy. In some respects a warrantor and a title company stand in similar relation to the title, but his contract is different from that contained in a title policy.[12]

§ 162. **Condition in case of foreclosure of mortgage.** A mortgage policy contained a condition that no right of action should accrue on it until the insured had agreed to convey to the company his interest in the property at a price which, in the case of a title acquired through foreclosure, should be the amount bid at the foreclosure sale, and that payment, discharge or satisfaction of the mortgage indebtedness, except by foreclosure of the mortgage, should annul the policy. After the issue of the policy, suits were brought to establish mechanic's liens on the property, claimed to have existed when the policy was issued. The company defended them, but the liens were established, and the property was sold to satisfy them. The mortgagee foreclosed his mortgage and bought in the property for the amount due on his mortgage with interest and costs. The insured offered to convey the property to the title company for the amount bid at the foreclosure sale, and demanded, in default

[11] Place v. Title Ins. Co., 67 Minn. 126; 69 N. W. Rep. 706 (1897).

[12] Ocean View v. Title Guar. Co., 71 N. J. L. 600; 61 Atl. Rep. 83 (1905). Barton v. Title Co., 64 N. J. L. 24; 44 Atl. Rep. 871 (1899).

of a purchase for that amount, that the company redeem the property from the sale under the mechanic's liens. The company declined to do either. The insured redeemed the property and sued the title company for the amount so paid. The court said: "The policy provides that, where by foreclosure the insured has acquired title to the property, the price to be paid by the insurer 'shall be the amount bid at said foreclosure sale.' The defendant was obligated by the terms of the policy either to pay this amount or to relieve the property from all liens existing thereon at the date of the policy. It refuses to do either, and seeks to escape all liability by putting the burden of freeing the property from the liens existing thereon at the date of the policy upon the mortgagee, on the ground that, at the sale of the property under the mortgage, the mortgagee bid the full amount of his mortgage debt and thereby himself assumed the burden of paying off the mechanic's liens. Under the terms of the policy, the mortgagee had a right to look to the defendant for the extinguishment of all liens upon the property which existed at the date of the policy, and to gauge his bid on the assumption that the defendant would discharge its obligation in this regard. The contention of the defendant is in the teeth of a very plain provision of the policy which declares: 'Payment, discharge or satisfaction of said mortgage indebtedness (except by foreclosure of said mortgage) * * * shall fully terminate, annul and avoid this policy and all liability of the company thereunder.' The case at bar falls directly within this exception. We need not consider what effect this provision would have where the property was purchased by a stranger at the foreclosure sale. Beyond controversy, it includes and binds the parties to the contract, and is applicable to every case where the mortgagee, insured, becomes the purchaser of the property at the foreclosure sale for the amount of the mortgage debt."[13]

§ 163. **Conditions as to special assessments or mechanic's liens.** Title insurance, in its main features, is intended to apply to and to cover the chain of title from the government to the person who deals with the land and obtains a title policy. It is not primarily or usually obtained in order to guard against

[13] Minn. Title Co. v. Drexel, 70 Fed. Rep. 194; 17 C. C. A. 56; 36 U. S. App. 50 (1895).

loss from liens and charges which are incident to the ownership of real estate, or which grow out of situations and conditions in its management, not disclosed by the public records. One who is about to purchase a city or town lot, or who is about to loan money on it, will doubtless examine the premises. He may see for himself the condition of the municipal improvements, and he may ask of the owner the production of receipts to show that the improvements which are finished have been paid for. He will know whether building operations on the lot are in progress and whether he should guard against mechanic's liens. Special assessments and mechanic's liens, not of record, are not usually covered by title insurance policies. In most forms of policies there is a special provision that loss or damage by reason of special taxes, special assessments, water rentals or water taxes which have not been confirmed by a court of record, and mechanic's liens when no notice thereof appears of record, are not covered by the policy. With most companies, therefore, protection against mechanic's liens which may arise, attach and relate back is not a matter of general and ordinary title insurance, but is a matter of special arrangement and contract. When a purchaser or mortgagee of property desires protection against mechanic's liens, he pays over the money, or a part of it, to a title company which pays it out as the work progresses, obtains the necessary waivers and releases of liens, and makes a special charge for the service.

§ 164. **Condition as to special assessments.** A title company issued a mortgage policy insuring the holder against loss by reason of defects in the title, excepting such as were set forth in schedule B. This schedule set forth, as not insured against, "the unmarketability of the title by reason of the possibility of mechanics' liens and municipal liens" and added "but actual losses by reason of such liens or by reason of the non-completion of the building now in process of erection on the premises, unless such building should happen to be destroyed by fire, are hereby insured against." Three years after the date of the policy municipal work was done in paving the street, for which a special assessment was levied on the property. It was held that this assessment was not a charge on the property at the date of the policy and created no cause of action under it. The court said: "The general intent and effect of the

whole policy were to insure the mortgage as a valid security both as to title and incumbrances. As to title, all defects were included except the one of unmarketability by reason of possibility of liens; as to liens or incumbrances, only those were included which come under either, first, the main covenant, those actually charging the property at the date of the policy, or secondly, under schedule B, 'mechanics' or municipal claims which do or may now exist' at the same date, to-wit, inchoate mechanics' liens which, though not yet in actual existence, may, within six months of the completion of the building, spring up and acquire the existence as of a date prior to the policy. Not until by the lapse of time the dangers of such liens should be passed, would the mortgage be secure as a first incumbrance. Before so secure, there was the danger not only of mechanics' but also of municipal liens intervening. The latter were therefore classed with the former, and actual loss by reason of either was insured against. But there is no covenant or language indicating any intent to go beyond that limit of time, and to assume a general liability to indemnify against possible future incumbrances, municipal or other. The policy was executed in 1888. The municipal work for which the claims in question were filed was not done till 1891. Such claims were neither a charge on the property at the date of the policy, nor became so within the period provided for in schedule B. They were not within the policy at all and created no cause of action under it."[14]

§ 165. **Stipulation to defend the insured.** A policy provided that the company should at its own cost defend the insured in every proceeding adverse to the title thereby guaranteed, provided, within a reasonable time after the commencement of the action, the insured should give the company written notice of the pendency of the proceeding. The title of the insured was divested by the foreclosure of a mortgage which was a lien on the premises when the policy was issued and was not excepted therein. In a suit on the title policy it was admitted that no notice of the foreclosure proceeding had been given to the company, but plaintiff alleged that defendant had waived the notice. On the trial of the suit on the policy, plaintiff

[14] Wheeler v. Title Co., 160 Pa. St. 408; 28 Atl. Rep. 849 (1894).

testified that when he first heard of the outstanding mortgage he informed an agent of the company of its existence, that the agent told him it did not amount to anything and not to pay any further attention to it, and that on account of what the agent then said he gave no notice to the company when he was served with process in the foreclosure suit. In passing on this testimony the court said: "If the plaintiff relied on the statement of the agent that he need pay no attention to the (mortgage) and that it was for that reason that he did not give the written notice of the foreclosure proceedings, the defendant is estopped, under the rule, from availing itself of plaintiff's failure in that respect." [15]

A title company issued a mortgage policy in a sum not exceeding $2,200, covering a mortgage of that amount. Among the stipulations and conditions of the policy was the following: "This company will, at its own cost and charge, defend the insured in all actions in ejectment or other proceedings founded upon a claim of title or incumbrance prior in date to this policy, and not herein and in schedule B excepted." Some months afterward the mortgagee foreclosed the mortgage and bid in the property at the sale. No redemption was made, and he became the owner of the property. After the policy was issued a mechanic's lien was filed which related back to a time prior to the date of the policy. This mechanic's lien was foreclosed in a suit to which the mortgagee, a non-resident, was made a party, and the lien was adjudged to be paramount to the lien of the mortgage. The property was sold, and, no redemption having been made, a deed was issued, which divested the title of the original mortgagee. The company was notified of the commencement of the suit to foreclose the mechanic's lien and conducted the defence of the same in the name of the mortgagee under the provisions of the policy above quoted. It was claimed that the company was negligent in not notifying the original mortgagee of the condition of the suit, of the entry of the decree foreclosing the mechanic's lien and of the sale of the property, and that the measure of damages was the value of the property which was lost by the foreclosure of the mechanic's lien, and not the $2,200 fixed as the

[15] Purcell v. Land Title Co., 94 Mo. App. 5; 67 S. W. Rep. 726 (1902).

maximum of insurance. The court said: "When, under the terms of this policy, the insurer undertook to defend the insured, it was bound to protect him through all stages of the proceeding, or else notify him that it would not, in time to enable him to protect himself. It was also bound to furnish him at such time all reasonable information of the status of the adverse claims, so as to enable him to take all proper precautions for his protection. The defendant failed to protect the insured, and has failed to prove that it gave him any such notice in time to enable him to protect himself; therefore, as a question of law, the plaintiff was entitled to recover full compensatory damages." A judgment against the company for $2,650, the value of the property, was sustained.[16]

§ 166. **Subrogation of insurer to rights of insured.** An owner of certain lands mortgaged them, and, at the same time and as further security for the indebtedness, the owner and certain sureties executed to the lender a bond which, after reciting the execution of the note and mortgage to secure money with which to erect and complete a building on the premises, was conditioned that he would complete the building, pay and discharge all claims and demands for labor and material furnished for the building, and all liens on account thereof, and in-

[16] Quigley v. St. Paul Title Co., 60 Minn. 275; 62 N. W. Rep. 287 (1895); 64 Minn. 149; 66 N. W. Rep. 364 (1896). It would seem that while substantial justice may have been done between the parties to this suit, the plaintiff was permitted to declare on one cause of action and to recover on another. The company undertook to carry out the stipulation of the policy to act as his agent and attorney in the proceeding "founded upon a claim of title or incumbrance prior in date to this policy," but was so derelict and negligent that the insured lost his property. He had the right to sue the company on its policy because his title was divested by reason of a lien existing at the date of the policy, and he could recover the maximum amount of insurance provided for in the contract. He also had the right to sue it for negligence in its undertaking to carry out the terms of the stipulation and he could recover the full amount of his loss, to-wit, the value of the property. But it is difficult to see how, in a suit on the contract of insurance, he could obtain greater indemnity than the contract called for. It might be supposed that the $2,650 was the maximum amount of the policy with interest to the date of the judgment, but the opinion expressly states that the premises were found by the jury to be worth $2,650, the amount of the verdict.

demnify and save harmless the lender from all such claims and all liens on account of or arising out of the same, and from any damage or loss arising therefrom, including all expenses of litigation incurred in clearing or satisfying such liens. Thereafter a title company issued to the lender a mortgage policy of insurance agreeing to indemnify the mortgagee against prior liens, in which policy it was provided that if the company should be compelled to pay any sums under the contract of insurance, it should be subrogated to all the rights of the mortgagee under the mortgage or otherwise. Subsequently certain liens for labor and material furnished for the building on the mortgaged premises were adjudged to be superior to the lien of the mortgage. Thereupon the title company paid and satisfied these liens, according to the terms of its policy, and obtained from the lender an assignment of the bond. It then brought an action on the bond to recover the money so paid to satisfy the liens. The court said: "This statement of the facts is all that is necessary to show that the case was rightly decided in favor of the plaintiff. If (the owner of the mortgage) had paid off the liens, he would have had a cause of action on the bond to recover the amount thus paid out. He would not have been compelled to wait until his mortgage matured, and then foreclose, in order to ascertain if the premises would bring enough to pay both the mortgage debt and the amount paid to discharge prior liens, and then sue on the bond for the deficiency, if any. Defendant's counsel conceded this on the argument. The bond may be, as counsel suggests, one of indemnity, and that the obligee must allege and prove loss or damage. But that loss or damage is sustained when he has to pay off liens on the property, which by the terms of the bond the obligors should have paid or caused to be paid. One of the conditions of the bond was that the obligors would indemnify the obligee from any expense incurred in clearing or satisfying liens on the property. But it makes no difference whether the holder of the mortgage, in the first instance, paid off the liens, or whether the plaintiff paid them off, as obligated by its policy. When plaintiff, as insurer of the title, paid them off, it was entitled, as between itself and defendants, to be subrogated to the mortgagee's rights in all securities which he held to protect his interest as mortgagee

against the liens. As between the mortgagee and the plaintiff, the latter's right of subrogation would have been subject to the paramount right of the former to the securities, as indemnity against other liens; but, as the holder of the mortgage has voluntarily assigned the bond to the plaintiff, no such question is involved in this case."[17]

§ 167. **Defects in title not insured against.** "Tenancy of the present occupants" was mentioned in a policy of title insurance as a defect in the title against which the company did not insure. The phrase was construed to mean the tenancy which arises through the occupation or temporary possession of the premises by those who are tenants in the popular sense of the word, and was held not to include the claim of a person who, asserting ownership in fee as against the title insured, was in actual adverse occupation at the time the policy was issued. "Tenancy of the present occupants" does not mean "title of the present occupants."[18]

§ 168. **List of defects or liens in schedule B.** A schedule attached to a policy of title insurance to show in detail any liens "which do or may now exist, and against which the company does not agree to insure or indemnify," does not profess to set out all the incumbrances or liens which exist against the property. A certificate of title would set out every possible lien against the property, but such a schedule only specifies those liens or incumbrances which shall not be within the protection of the insurance. If any lien or incumbrance is omitted from this list, the presumption is that the company assumed the risk of any loss which might result to the insured because of the existence of the omitted lien or incumbrance.[19]

§ 169. **Scope of the contract of title insurance.** A policy of title insurance states the condition of the title to the real estate described in it, sets forth the interest of the insured in the title, and agrees to indemnify him if the condition of the title and his interest are not as stated. If the company issuing the

[17] St. Paul Title Ins. Co. v. Johnson, 64 Minn. 492; 67 N. W. Rep. 543 (1896).

[18] Place v. Title Ins. Co., 67 Minn. 126; 69 N. W. Rep. 706 (1897).

[19] Fidelity Ins. Co. v. Earle, 23 Pa. Co. C. Rep. 449 (1900).

policy is mistaken as to the condition of the title, or as to his interest in the property, and loss occurs by reason of the mistake, the company must indemnify the insured to the extent of his loss, provided it does not exceed any maximum amount which may be named in the policy. Where one in possession of real estate, claiming to own it in fee simple, in good faith applied to a title company for insurance and received a policy insuring him in a fee simple title, and thereafter in a partition proceeding it was decided that he had only a half interest in the property, he may recover from the company one half of the value of the property, and it cannot claim that, as he never had title to the half interest, he suffered no loss. In discussing this subject it was said:—"A case stated was agreed upon, and the cause submitted to the court below, which entered judgment in the following language: 'This policy is not a guaranty of title, but a contract of indemnity. The plaintiff has lost nothing. Judgment for defendant on case stated.' In reaching this conclusion, the learned court adopted the suggestion of the defendant that the plaintiff lost nothing, because he never did, in fact, have the title to the entire interest, as he supposed he had, and therefore he could not be said to lose that which he had never owned. As a logical statement taken in the abstract, this is unassailable; but, in determining whether or not the failure of his title to the one-half interest in the property constituted such a loss as would entitle him to indemnity under the terms of his insurance policy, we must examine the contract in the light of the purpose or object for which it was made. It is admitted that, if plaintiff had purchased or improved the property in reliance upon the policy, he could recover; but as he was in possession as owner, before he applied for and received the insurance, it is urged that he lost nothing, because he expended nothing in reliance upon the policy. We cannot see any sound reason for this attempted distinction between the rights of a present and prospective owner, who applies for title insurance. Relief of mind to an owner, obtained through title insurance, is quite as desirable as the same assurance furnished to a prospective purchaser or mortgagee. The sole object of title insurance is to cover possibilities of loss through defects that may cloud or invalidate titles. It is for the assumption of whatever risk there may be,

in such connection, that the premium is paid to and accepted by the company which issues the policy. Title insurance is not mere guesswork, nor is it a wager. It is based upon careful examination of the muniments of title, and the exercise of judgment by skilled conveyancers. The quality of a title is a matter of opinion, as to which even men learned in the law of real estate may differ. A policy of title insurance means the opinion of the company which issues it, as to the validity of the title, backed by an agreement to make that opinion good, in case it should prove to be mistaken and loss should result in consequence to the insured. 'Loss' is a relative term. Failure to keep that which one has, is loss. The plaintiff in this case, upon September 12, 1894, found himself in possession of a property, devised to him, as he supposed and claimed, in the will of his mother. Wishing to safeguard himself in the enjoyment of his title, he applied to the defendant company for insurance. * * * It must be borne in mind that the real subject of insurance is not the concrete thing, but the interest which the one to be indemnified has in the concrete thing. The interest which plaintiff desired to protect was the entire interest as owner in fee of the property in question. It was this interest which he submitted to defendant company as the subject-matter of insurance. It was for the company, then, to examine the evidence of his title, and to say whether or not it would assume the risk of making good to him the injury which would result, in case his claim of title to the entire interest should prove defective. The contract which he asked for, and which by its policy the company made with him, was one of insurance against defects in the title, as he claimed it to be and as the company agreed with him, after examination, that it was, viz., title to the entire interest in the property. The policy applied to the situation as it then existed. It insured the plaintiff against defects, unmarketability, liens, and incumbrances as of that date. It said to him: 'You are, in our judgment, the owner in fee of the entire interest in this property, and we will back our opinion by agreeing to hold you harmless, up to the amount of the policy, in case for any reason our judgment in this respect should prove to be mistaken.' The risks of title insurance end, where the risks of other kinds of insurance begin.

Title insurance is designed to protect the insured, and save him harmless from any loss arising through defects, liens, or incumbrances that may be in existence, affecting the title when the policy is issued. It does not protect against any claim arising after the issuance of the policy. In the present case, the validity of the plaintiff's claim to the entire interest in the property depended upon the construction of the language of the will of Louisa Foehrenbach. Evidently the defendant company, having the will before it, construed the devise as a life estate on the first taker, and a fee in the remainderman; otherwise, it would not have issued its policy insuring a fee in the remainderman. In adopting this construction, it was mistaken, for when, some 10 years afterwards, the question was raised in the orphans' court, under the partition proceedings, it was decided that the first taker took a fee simple. The title of the plaintiff to the property in question was not, therefore, derived from his mother, as claimed by him in his application for insurance, but whatever interest he had came to him through his half-brother, John Baker, from whom he took only an undivided one-half interest. Can there be any doubt that the reduction of his interest in the property from an ownership of the whole, to that of one-half, was a defect, coming directly within the terms of the policy? No matter whether or not the question of the amount of his interest was doubtful when the policy was issued, the risk of insuring him in his claim of title was one which the defendant could legitimately take, if it chose to do so. Insurance carries with it the idea of protection against some risk. If there were no risk, there would be no cause for insurance. The underlying principle of insurance is the contribution of small sums by a large number of insured, to a common fund, from which to indemnify those who actually suffer the loss, which might have fallen upon any of them. Actual loss, of course, must precede the right of compensation; but that is measured by the standard accepted as between the parties. In this case the standard of interest, which was claimed by appellant, was ownership in fee of the entire property. That standard was, after examination of the muniments of title by the defendant company, admitted as correct, and the policy of insurance was issued, for a proper consideration, agreeing to insure the plaintiff against any loss

or damage by reason of defects in that particular interest or claim of title which he had presented to the company; that is, against any outstanding claim which would reduce his interest below that which he claimed it to be. It requires no argument to show that the absolute failure of title to one-half the interest was a serious defect, as compared in extent and quality with the title to the entire interest, which he had asserted and submitted to the defendant company as the basis upon which the insurance was to be effected, and which was accepted and approved by it, as set forth in the policy. The estate or interest of the insured which was covered by the policy was that of owner in fee of the entire property. Any defect in title which reduced his interest below that point was it seems to us, just that much loss or damage, for which he was entitled to be indemnified. The fact that an application is made for title insurance by one who, at the time, claims to be the owner, is sufficient of itself to put the insurance company on its guard, and ought to be regarded by it as notice that unusual care should be taken in the examination of the title." [20]

§ 170. **Reformation of policy of title insurance.** Where a policy of title insurance covering five separate pieces of property was not issued at the time the deeds to four of the parcels were delivered and accepted, but its issuance was postponed until after the title to the fifth parcel was perfected, evidence of the facts and circumstances under which the contract of insurance was made, showing that there was no purpose on the part of either party to have any of the title insured beyond the moment when they became the property of the insured; the fact that the issuance of a single policy after all the titles were perfected was agreed on as a matter of convenience, with no thought of changing the liability of the insurer from what it would have been if a policy on the first four titles had been issued when the conveyances of them were made, and the fact that there was no mistake as to the actual terms of the agreement to be expressed in the policy, but that in reducing it to writing the real date of the policy as to the four pieces of property was inadvertently omitted, will justify the trial

[20] Foehrenbach v. Title & Trust Co., Pa. ; 66 Atl. Rep. 561 (1907). See Purcell v. Land Title Co., 94 Mo. App. 5; 67 S. W. Rep. 726 (1902). § 32.

court in reforming the policy so as to make it conform to the actual agreement of the parties. In such a case the insured cannot maintain an action to compel the insurer to reimburse the insured for the amount paid on a special assessment which became a lien on one of the four properties three months after the insured had taken title thereto and possession thereof, and seven months before the policy was issued, for in such a case the insurer is not liable for an assessment levied on that property after the conveyance of it to the insured, but before the date of the policy as inadvertently given.[21] In seeking to reform a policy, the testimony of experts in title insurance as to what they would have done, or as to what ought to have been done, in issuing the policy in question, and as to the custom of title insurance companies in such cases, it is not admissible to support the legal conclusion that the policy should have been different in form.[22]

§ 171. **Voluntary surrender of property under terms of a decree.** Where a person held a fee policy on the title to land of which he was in possession, and afterward, in a partition proceeding, of which the company had due notice under the terms of the policy, it was decided that he was the owner of only one-half of the land, and he voluntarily surrendered possession of the premises to the purchaser at the partition sale, it was held that his voluntary surrender of the premises did not preclude a recovery on the policy. Under such circumstances both he and the company were bound by the result of the litigation, and it was not necessary for him to resist the decree to the point of being physically expelled from the premises. Proper respect for the court forbade any physical resistance to its decree.[23]

§ 172. **Renewal of mortgage, mechanic's lien, priority.** Where a mortgage on a piece of land was renewed before any mechanic's lien on the property was filed and in ignorance of any intervening lien or a right to a lien, the new mortgage will

[21] Trenton Potteries Co. v. Title Guar. Co., 176 N. Y. 65; 68 N. E. Rep. 132 (1903); affirming 74 N. Y. Supp. 170; 68 App. Div. 636 (1902); reversing 64 N. Y. Supp. 116; 50 App. Div. 490 (1900).

[22] Trenton Potteries Co. v. Title Guar. Co., supra.

[23] Foehrenbach v. Title Trust Co., Pa. ; 66 Atl. Rep. 561 (1907).

occupy the same place, so far as priority is concerned, as the one it superseded.[24]

§ 173. **Liability for use of party wall.** The owner of several adjoining lots conveyed one with a house on it to plaintiff, excepting and reserving the western half of the party wall. He then sold the vacant lot and the right to use this party wall to another person, who used the wall in building a house, and refused to make compensation therefor. The plaintiff, when he purchased the property, obtained a title policy which made no mention of the party wall, and when his adjoining neighbor refused to pay for using it, he brought suit on the policy. The court said: "The plaintiff alleges that the refusal of the adjoining owner to make compensation is an incumbrance, or if not an incumbrance, that it is a partial eviction. We are unable to agree with the plaintiff in either way he puts his claim. The party wall is an incumbrance on the adjoining lot, but the right to compensation for the use of it is not an incumbrance under the policy of insurance. It is a mere chose in action. It is not a lien or incumbrance which has been or could be put into judgment against the plaintiff's property, and hence cannot be recovered in a suit on the policy. Nor has there been an eviction which must be an ejection from or deprivation of a thing. The plaintiff has not lost any part of his property by eviction under an adverse title. The ground on which the west half of the wall rested belonged to the person who used the wall and not to the plaintiff. All that the plaintiff lost is the expectation of compensation for use of the wall. That was not covered by the policy." [25]

§ 174. **Defence to action on title policy.** It is no defence to an action on a title insurance policy that the conveyancing of the property was done by the insured's conveyancer who described the wrong property in the deed.[26]

§ 175. **Measure of damages on a policy of title insurance.** In discussing the measure of damages on a policy of title insurance, it must always be borne in mind that the amount of the re-

[24] Title Guarantee Co. v. Wrenn, 35 Ore. 62; 56 Pac. Rep. 271 (1899).

[25] Thomas v. Tradesmen's Trust Co., 7 Pa. Dist. Rep. 375 (1897). The right to build a party wall on adjoining property is given by statute in Pennsylvania.

[26] Gauler v. Solicitor's Co., 9 Pa. Co. C. Rep. 634 (1891).

covery cannot exceed the maximum amount of insurance provided for in the contract. The real measure of damages for the loss may exceed that amount, but the amount of the recovery on the contract must be limited by its provisions. In one case this doctrine, which seems to be elementary, was expressly repudiated, but the case should not be followed.[27] Where the insured purchased the property described in the policy issued to him, and soon afterward the title proved to be wholly defective, the measure of damages was held to be the price paid for the property.[28] In another case it was held that where there is a total failure of the title insured there is but one measure of damages to be applied, and that is the value of the property lost.[29] Where after the issue of the policy the title proves defective, or a prior incumbrance must be removed, the insured is entitled to recover the necessary cost and expense incurred by him in curing the defect or removing the lien.[30]

§ 176. **Measure of damages on guaranty of correctness of certificate of title.** Where a certificate of title is guaranteed to be correct, and it is in fact incorrect, there is an immediate breach on the delivery of the guaranty, and a cause of action at once arises against the guarantor. If the person guaranteed has sustained no loss on account of the breach of the guaranty, it is doubtful whether he may recover more than nominal damages, but where he has sustained a loss, he is entitled to the same measure of damages as is applied in cases of loss under a title insurance policy.

§ 177. **Statute of limitations on a policy of insurance.** A contract of insurance is a contract of indemnity, and it is one of the elementary characteristics of the contract of indemnity that no cause of action arises under it until the insured has sustained a loss. Under it there can be no contention that a cause of action accrues at the date of the delivery of the policy

[27] Quigley v. Title Co., 60 Minn. 275; 62 N. W. Rep. 287 (1895); 64 Minn. 149; 66 N. W. Rep. 364 (1896). See note at § 165.

[28] Ehmer v. Title Guar. Co., 156 N. Y. 10; 50 N. E. Rep. 420 (1898); affirming 34 N. Y. Supp. 1132; 89 Hun 120 (1895).

[29] Gauler v. Solicitor's Co., 9 Pa. Co. C. Rep. 634 (1891).

[30] Minn. Title Ins. Co. v. Drexel, 70 Fed. Rep. 194; 17 C. C. A. 56; 36 U. S. App. 50 (1895). German Am. Title & Trust Co. v. Citizens T. & T. Co., 190 Pa. St. 247; 42 Atl. Rep. 682 (1899).

and not at the time of the loss, for actual damage must have been suffered before there is any right to compensation or redress. The indemnity in title insurance is not against defects in the title or prior incumbrances, but is against the assertion of such or other claims or rights in the property and the loss which may be occasioned thereby. A defect in the title or a prior incumbrance may exist at the time of the delivery of the policy of title insurance, but no claim against the company arises under it until the adverse claim against the property is actually asserted in court. Then, if there is a contract on the part of the company to defend, the insured may call on the company to conduct the defence, and it must be given time and opportunity to defend against the claim. If the claim is established as the result of the litigation, and the insured is required to pay out money to perfect his title or to remove a lien, he has a complete cause of action on his policy. From this brief statement of the nature and conditions of the contract, it is evident that the statute of limitations on a policy of title insurance does not begin to run until the insured has actually sustained a loss for which he is entitled to indemnity under the terms of the contract.[31]

§ 178. **Statute of limitations on guaranty that certificate of title is correct.** Where a company issues a mere certificate of title and guarantees that it is correct, any breach of the contract is founded on the error in the certificate, and is complete when the contract of guaranty is delivered. The statute of limitations begins to run from the date of the delivery of such a contract of guaranty, even though no special damage results until long after it is delivered. Such a contract of guaranty is not a continuing one, on which a new cause of action accrues whenever special damage is suffered by its breach. The cause of action is the breach of the guaranty and not the consequential damage resulting therefrom, and the statute begins to run from the time of the breach and not from the time of the consequential damage.[32]

[31] Purcell v. Land Title Co., 94 Mo. App. 5; 67 S. W. Rep. 726 (1902).

[32] See Purcell v. Land Title Co., 94 Mo. App. 5; 67 S. W. Rep. 726 (1902). Schade v. Gehner, 133 Mo. 252; 34 S. W. Rep. 576 (1895). Lattin v. Gillette, 95 Cal. 317; 30 Pac. Rep. 545; 29 Am. St. Rep. 115 (1892). Lawall v. Groman, 180

§ 179. **Title insurance company as a party defendant.** Where a title insurance company has an interest in the real estate which is the subject of litigation, it is a necessary party to a complete remedial action, but it is not entitled to be made a party defendant to an action involving the title to or a lien on real estate, merely because it has an interest in the title from having insured it. The subject of such an action is the real estate, and in this the insurance company has no interest. Its interest is only in the question involved in the action, and this is not such an interest as is covered by a statute directing that all parties interested in the property in controversy be made parties defendant in a suit. A company which has insured the title to the property which is the subject of an action may protect its interests through the insured, and it thus has an opportunity to protect its interests without being made a defendant.[33]

§ 180. **Representative character of party defendant.** A receiver of all the property of a judgment defendant, appointed by the court in a proper proceeding, is invested with the absolute title to all the property by a conveyance of it by the debtor, made to him voluntarily or in pursuance of an order of the court. Where he is made party defendant in foreclosure by his individual name, followed by the word "receiver" only, and he appears generally by attorney, he becomes a party to the suit in his representative capacity and as such receiver is bound by the judgment therein.[34]

§ 181. **Right of proposed insurer to examine the records.** A corporation employed to examine the title to any certain piece of real estate is subrogated to the right of its employer to have access to the records, and the fact that it contemplates the issue

Pa. St. 532; 37 Atl. Rep. 98; 57 Am. St. Rep. 662 (1897). Fox v. Thibault, 33 La. Ann. 32 (1881). Provident Trust Co. v. Wolcott, 5 Kan. App. 473; 47 Pac. Rep. 8 (1895).

[33] Russ v. Stratton, 28 N. Y. Supp. 392; 8 Misc. Rep. 6 (1894).

[34] Graham v. Title Ins. Co., 46 N. Y. Supp. 1055; 20 App. Div. 440 (1897). But see Landon v. Townshend, 112 N. Y. 93; 19 N. E. Rep. 424 (1889), where a general assignee in bankruptcy was made defendant, without any addition whatever to his individual name, and he appeared generally by an attorney; it was held that the foreclosure was insufficient to bar the equity of redemption of such assignee.

of a policy of insurance on the title to the property, in case the title is found to be satisfactory, does not detract from the right of access. Notwithstanding the proposed contract of insurance, the examiner is still acting for the interested person in substantially the same manner as he would act in the absence of such a contract. The real occasion and necessity for the examination of the records for the purpose of ascertaining the true state of the title and the existence or non-existence of liens on it is not done away with by the mere fact that the examiner proposes, if the title is satisfactory, to issue a policy of title insurance.[35]

§ 182. **Constructive notice of the public records.** Under the recording laws the prevailing doctrine is that the recording of an instrument by the grantee is a declaration by him of his interest in the land therein described to all persons subsequently dealing with it. He is estopped, as against one who has dealt with the premises relying on the record, to assert that his interest is greater or his lien more onerous than was described in the record of such instrument. Subsequent purchasers or incumbrancers may lawfully assume that the title is completely disclosed on the records, unless there is some circumstances which they are bound to take notice of and which should apprise a reasonable and prudent man that the records are defective on the very point of error.[36] An insurance company which has insured the title of a subsequent purchaser or incumbrancer, relying on the public records, is entitled to invoke this doctrine through the insured and thus protect itself and him. If the record of an instrument may not be relied on as showing its contents and its effect on the title, title insurance ceases to apply to a situation as it exists at the time the policy is issued, and becomes a wager on the correctness of the public records and the validity of the title.

[35] West Jersey Title Co. v. Barber, 49 N. J. Eq. 474; 24 Atl. Rep. 381 (1892). See § 96.

[36] Johnson v. Hess, 126 Ind. 298; 25 N. E. Rep. 445 (1890). Taylor v. Harrison, 47 Texas 454; 26 Am. Rep. 304 (1877). Jones v. McNarrin, 68 Me. 334; 28 Am. Rep. 66 (1878). Stewart v. Walker, Neb. ; 113 N. W. Rep. 814 (1907). See § 11.

APPENDIX

Owner's Application.

PREMIUM RATES COVER ONLY THE TITLE AT DATE OF APPLICATION.

	CHICAGO,.....190..	
No.	The undersigned hereby applies to the CHICAGO TITLE AND TRUST COMPANY for a Guaranty Policy in its usual form, in the sum of . . . . . $.. upon the title to the lands hereinafter described.	
PROMISE		
DATE TO BE COVERED	It is agreed that the following statements are correct and true, to the best of applicant's knowledge or belief, and that any false statements or any suppression of any material information shall avoid said policy.	Premium $..
		Continuation fee, $..
NO. ABS. LEFT.....		
BOX		Recording fees, $..

Description of premises, including description of improvements, with street number. Size of lot	feet front by feet deep.
In possession of	
Claiming under	
Title now vested in	
Party to be guaranteed. His [or her] address. (If title in woman, maiden name.) His [or her] occupation. Is he a citizen of the U. S.?	Married.....day of.....in.....
Estate or interest to be guaranteed. Value of property.	Land, $ Improvements, $
If estate is not vested in party whose title is to be guaranteed, state how same is to be vested.	By Deed from to
Incumbrances.	
Taxes and assessments which are liens.	Taxes for the year 1... and 1..., and special assessment for
Adverse claims or objections to title, known or rumored.	

The applicant hereby agrees that if, before the delivery of the policy, he shall have any further knowledge or information as to defects, objections, liens or incumbrances affecting the title to said premises, he will at once fully make known the same to the Company.

It is understood by the applicant that the Company will not by its policy guarantee against rights or claims of parties in possession, not shown of record.

If the Company, after examination, shall decline to issue the policy on account of defects in the title, the applicant hereby agrees to pay the necessary expenses incurred by the Company in making such examination.

..... APPLICANT.

ADDRESS .....

When application is made by a person other than the one to be guaranteed. } On behalf of.....

Mortgage Application.

No. ..... CHICAGO, ...190..

PROMISE .....

DATE TO BE COVERED .....

NO. ABS. LEFT.....

BOX .....

The undersigned hereby applies to the CHICAGO TITLE AND TRUST COMPANY for a Guaranty Policy in its usual form, in the sum of . . . . . $.. upon the title to the following described lands.

It is agreed that the following statements are correct and true, to the best of the applicant's knowledge or belief.

Premium, $..

Recording fees, $..

Description of premises, including House No....and a description of improvements.	
In possession of	
Estimate of value	Ground, $ Improvements, $
Party to be guaranteed and nature of his estate or interest.	
Instrument conveying estate to be guaranteed.	Mortgage / T. D. } dated.....executed by.... to ..... as ..... to secure $.....
Address and occupation of grantor in above incumbrance.	
Is title now vested in grantor in above incumbrance? If not, state when and how same will be vested in him.	To be vested in.....by deed from .....to be handed to you for record on or about.....
Incumbrances.	

The applicant hereby agrees that if, before the delivery of the policy, he, or his agent, should have any further knowledge or information as to defects, objections, liens or incumbrances, affecting the title to be guaranteed, he will at once fully make known the same to the Company.

If the Company, after examination, declines to issue the policy on account of defects in the title, the applicant agrees to pay the necessary expenses incurred by the Company in making such examination.

..... APPLICANT.

ADDRESS .....

FORM A.

Capital, . . $5,000,000

CHICAGO TITLE AND TRUST COMPANY

Of Chicago, Illinois.

No..... Amount $.....

This Guarantee Policy Witnesseth, that the

CHICAGO TITLE AND TRUST COMPANY,

In consideration of the sum of.....Dollars, to it in hand paid, doth hereby guarantee (the owner), heirs or devisees, or any person or persons to whom this policy shall be transferred, with the assent of the Company endorsed hereon, against all loss or damage not exceeding.....Dollars, which the said party guaranteed shall sustain by reason of defects in the title of the party guaranteed, as set forth in Schedule A, hereunto annexed, to the real estate or interest therein, described in said Schedule A, or by reason of liens or incumbrances affecting the same, at the date hereof, excepting only such liens, incumbrances and other matters as are set forth in Schedule B, hereto annexed, subject to the conditions and stipulations hereto annexed and made a part of this policy.

This policy is issued upon application by or on behalf of the party guaranteed, numbered.....which application shall be held against all parties claiming hereunder to be a warranty of the facts therein stated.

In Witness Whereof, the Chicago Title and Trust Company hath caused its corporate seal to be hereto affixed and these presents to be signed by its..... President and attested by its.....Secretary, this .....day of.....in the year of our Lord one thousand nine hundred and.....

..... President.

Attested:

..... Secretary.

SCHEDULE A.

1.
The estate or interest of the party guaranteed covered by this policy.

2.
Description of the real estate in respect of which this policy is issued.

SCHEDULE B.

Showing estates, or defects in title, and liens, charges and incumbrances thereon, which do or may now exist, and against which the Company does not guarantee.

1. Rights or claims of parties in possession not shown of record and questions of survey.

2.

3.

4.

CONDITIONS AND STIPULATIONS OF THIS POLICY.

1. The CHICAGO TITLE AND TRUST COMPANY shall have the right to, and will, at its own cost and charges, defend the party guaranteed in all actions of ejectment or other action or proceeding founded upon a claim of title, incumbrance or defect which existed or is claimed to have existed prior in date to this policy and not excepted herein; reserving, however, the option of settling the claim or paying this policy in full; and the payment or tender of payment to the full amount of this policy shall determine all liability of this company thereunder. In case any such action or proceeding shall be begun, it shall be the duty of the party guaranteed at once to notify the company thereof in writing, and secure to it, when practicable, the right to defend such action or proceeding, and to give all reasonable assistance therein. If such notice shall not be given to the company within ten days after summons or other process in such action or proceeding shall be served upon the party guaranteed in person, then all liability of this company in regard to the subject matter of such action or proceeding shall cease and be determined.

2. Whenever the company shall have settled a claim under this policy, it shall be entitled to all rights and remedies which the party guaranteed would have had against any other person or property in respect to such claim, had this policy not been made, and the party guaranteed undertakes to transfer to the company such rights and to permit it to use the name of the party guaranteed for the recovery thereof. Any sum collected on such rights over and above the amount of loss paid by said company, shall belong and on demand shall be paid to the party guaranteed. The party guaranteed warrants that such rights of subrogation shall vest in the company unaffected by any act of the party guaranteed.

3. Nothing contained in this policy shall be construed as a guarantee against loss or damage by reason of fraud on the part of the party guaranteed; or by reason of claims undisclosed of record arising under any act done or trust relationship created, suffered or permitted by said party; or by reason of the fact that said party was not a purchaser for value, or that said party contravened the laws of the United States establishing a uni-

form system of bankruptcy in his acquisition of the estate or interest hereby guaranteed; nor against the rights of dower and homestead, if any, of the spouse of the party guaranteed; nor will this company be liable in any event for any loss or damage arising from the refusal of any party to carry out any contract to purchase, lease or loan money on the estate or interest guaranteed.

4. Loss or damage by reason of special taxes, special assessments, water rentals or water taxes, which have not been confirmed by a Court of Record, conveyances or agreements not of record at the date of this policy, or mechanics' liens when no notice thereof appears of record are not covered by it.

5. A statement in writing of any loss or damage for which it is claimed this company is liable shall be furnished to the company within sixty days after such loss or damage, and no right of action shall accrue under this policy until thirty days after such statement shall have been furnished, and no recovery shall be had under this policy unless action shall be commenced thereon within one year after the expiration of said last mentioned period of thirty days; and a failure to furnish such statement of loss or damage, and to commence such action within the times hereinbefore specified, shall be a conclusive bar against the maintenance of any action under this policy.

6. All payments under this policy shall reduce the amount guaranteed *pro tanto*, and no payment can be demanded without producing the policy for endorsement of such payment. If the policy be lost or destroyed, indemnity must be furnished to the satisfaction of the company.

This policy necessarily relates solely to the title prior to and including its date.

Assignments of this policy must be with the assent of the company endorsed hereon, and, to protect subsequent purchasers against intermediate claims or losses, must be continued to date.

Trustees and Mortgagees, to receive the benefit of this policy, should obtain a "mortgagee's policy" hereon.

In assenting to assignments no liability is assumed by the company for defects or incumbrances created subsequent to the date of this policy.

ASSIGNMENT OF POLICY.

Chicago, ...190.. For Value Received.....
hereby assign all interest in this policy to.....

Assented to.....190..
subject to foregoing conditions.
Chicago Title and Trust Company,
by .....

.....
.....
.....

FORM B.

Capital, . . $5,000,000

CHICAGO TITLE AND TRUST COMPANY
Of Chicago, Illinois.

No..... Amount $.....

This Guarantee Policy Witnesseth, that the
CHICAGO TITLE AND TRUST COMPANY,
In consideration of the sum of.....Dollars, to it in hand paid, doth hereby guarantee (the purchaser), heirs or devisees,

or any person or persons to whom this policy shall be transferred, with the assent of the Company endorsed hereon, against all loss or damage not exceeding.....Dollars, which the said party guaranteed shall sustain by reason of defects in the title of (the vendor), to the real estate or interest therein, described in Schedule A, or by reason of liens or incumbrances affecting the same, at the date hereof, excepting only such liens, incumbrances and other matters as are set forth in Schedule B, hereto annexed, subject to the conditions and stipulations hereto annexed and made a part of this policy.

This policy is issued upon application by or on behalf of the party guaranteed, numbered.....which application shall be held against all parties claiming hereunder to be a warranty of the facts therein stated.

In Witness Whereof, the Chicago Title and Trust Company hath caused its corporate seal to be hereto affixed and these presents to be signed by its..... President and attested by its.....Secretary, this .....day of.....in the year of our Lord one thousand nine hundred and.....

..... President.

Attested:

..... Secretary.

SCHEDULE A.
(SAME AS IN FORM A.)

SCHEDULE B.
(SAME AS IN FORM A.)

CONDITIONS AND STIPULATIONS OF THIS POLICY.

(THE FIRST SIX ARE AS IN FORM A. THE SEVENTH IS AS FOLLOWS:)

7. This policy shall not have any force or effect until the party guaranteed shall acquire said title as a *bona fide* purchaser for value and without notice of any defect in said title other than above set forth in Schedule B.

FORM C.

Capital, . . $5,000,000

CHICAGO TITLE AND TRUST COMPANY
Of Chicago, Illinois.

No..... Amount $.....

This Guarantee Policy Witnesseth, that the
CHICAGO TITLE AND TRUST COMPANY,
In consideration of the sum of.....Dollars, to it in hand paid, doth hereby guarantee and agree that it will pay to..... .....the trustee named in a certain trust deed, executed by.....[a further description of which said trust

deed is given in Schedule A, hereunto annexed], for the use and benefit of the owner of the indebtedness described in said trust deed, all loss or damage, not exceeding.....Dollars, which such owner, and the executors, administrators and assigns of such owner, shall sustain by reason of defects in the title of.....as set forth in said Schedule A, to the real estate or interest therein, described in said Schedule A, or by reason of liens or incumbrances affecting the same, at the date hereof, excepting only such liens, incumbrances and other matters as are set forth in Schedule B, hereunto annexed, subject to the conditions and stipulations hereunto annexed and made a part of this policy.

In Witness Whereof, the Chicago Title and Trust Company hath caused its corporate seal to be hereto affixed and these presents to be signed by its..... President and attested by its.....Secretary, this .....day of.....in the year of our Lord one thousand nine hundred and.....

..... President.

Attested:

..... Secretary.

SCHEDULE A.

1.
The estate or interest of the maker of the trust deed which is covered by this policy.

2.
Description of the real estate in respect of which this policy is issued.

3.
The trust deed securing the indebtedness of which the party for whose benefit this policy is issued is the owner.

SCHEDULE B.

Showing estates, defects or objections to title, and liens, charges and incumbrances thereon, which do or may now exist, and against which the Company does not guarantee.

1.
2.
3.
4.

CONDITIONS AND STIPULATIONS OF THIS POLICY.

1. The CHICAGO TITLE AND TRUST COMPANY shall have the right to, and will, at its own cost and charges, defend the party guaranteed and the owner of said indebtedness in all actions of ejectment or other action or proceeding founded upon a claim of title, incumbrance or defect which existed or is claimed to have existed prior in date to this policy and not excepted herein; reserving, however, the option of settling the claim or paying this policy in full; and the payment or tender of payment to the full amount of this policy shall determine all liability of this company thereunder. In case any such action or proceeding shall be begun, it shall be the duty of the party guaranteed and the owner of said indebtedness at once to notify the company thereof in writing, and secure to it, when practicable, the right to defend such action or proceeding, and to give all reasonable assistance therein. If such notice shall not be given to the company within seven days after the service of the first summons or other process in such action or proceeding, then all liability of this company in regard to the subject matter of such action or proceeding shall cease and be determined; *provided, however*, that failure to notify shall in no case prejudice the claim of the party guaranteed if neither said party nor the owner of said indebtedness shall be a party to such action or proceeding, nor served with summons therein, nor have any knowledge of such action or proceeding.

2. Whenever the company shall have settled a claim under this policy, it shall be entitled to all rights and remedies which the party guaranteed and the owner of said indebtedness would have had against any other person or property in respect to such claim, had this policy not been made, and the party guaranteed undertakes to transfer or cause to be transferred to it such rights, together with the right to use the name of the party guaranteed and the name of the owner of said indebtedness, when necessary for the recovery thereof, such rights of subrogation to vest in the company unaffected by any act of the party guaranteed or the owner of said indebtedness; but such subrogation and transfer shall be in subordination to the claim of such owner to receive and be fully paid the amount of principal and interest and other moneys, if any there be, secured by said trust deed.

3. Payment, discharge or satisfaction of the said indebtedness secured by the said trust deed, except by foreclosure, shall fully terminate, avoid and annul this policy and all liability of the company thereunder.

4. Nothing contained in this policy shall be construed as a guarantee against defects or incumbrances created subsequent to the date hereof, nor will this company be liable in any event for any loss or damage arising from the refusal of any party to purchase said indebtedness or the evidences thereof.

5. Loss or damage by reason of special taxes or special assessments which have not been confirmed by a Court of Record, conveyances or agreements not of record at the date of this policy, or mechanics' liens when no notice thereof appears of record are not covered by it.

6. It shall be the duty of the party guaranteed and the owner of said indebtedness, within thirty days after learning of any claim of title, incumbrance or defect not excepted in this policy, and before payment or settlement of the same, to notify the company in writing of the existence of such claim, incumbrance or defect; and in case any suit or proceeding shall be commenced founded on any such claim, incumbrance or defect, the company shall have the right, at its option, to pay to the owner of said indebtedness the amount then remaining unpaid thereon, together with any other moneys secured by said trust deed, and shall thereupon be entitled to an assignment and transfer of said indebtedness and of all instruments evidencing and securing the same, and such payment shall

terminate all liability under this policy; such right of payment, however, to be exercised within ninety days after the party guaranteed shall notify the company in writing of the pendency of such suit or proceeding.

7. A statement in writing of any loss or damage for which it is claimed this company is liable shall be furnished to the company within sixty days after such loss or damage, and no right of action shall accrue under this policy, until thirty days after such statement shall have been furnished, and no recovery shall be had under this policy unless action shall be commenced thereon within one year after the expiration of said last mentioned period of thirty days; and a failure to furnish such statement of loss or damage, and to commence such action within the times hereinbefore specified, shall be a conclusive bar against the maintenance of any action under this policy.

8. All payments under this policy shall reduce the amount guaranteed *pro tanto*, and no payment can be demanded without producing the policy for endorsement of such payment. If the policy be lost or destroyed, indemnity must be furnished to the satisfaction of the company.

FORM D.

Capital . . $2,000,000

THE LAND TITLE AND TRUST COMPANY,

Of Philadelphia, Pennsylvania.

This Policy of Insurance Witnesseth that

THE LAND TITLE AND TRUST COMPANY,

In consideration of the sum of.....Dollars, to them paid by .....do hereby insure the said.....and all persons claiming the estate and property hereinafter mentioned under.....by descent, by will, or under the intestate laws, and all other persons to whom this Policy may be transferred with the assent of this Company, testified by the signature of the proper officer of this Company endorsed hereon, that the title of the Assured to the estate, mortgage, or interest described in Schedule A hereto annexed, is good and marketable and clear of all liens and incumbrances charging the same at the date of this Policy; saving such estates, defects, objections, liens and incumbrances as may be set forth in Schedule B, or excepted by the conditions of this Policy hereto annexed and hereby incorporated into this contract—

Liability hereunder shall not exceed.....Dollars, and any loss shall be payable upon compliance by the Assured with the conditions hereto attached and not otherwise.

In Witness Whereof, the Common Seal of the said Company is hereunto affixed this.....day of.....in the year of our Lord one thousand nine hundred and.....

.....2nd Vice-President

.....Assistant Secretary.

.....Title Officer.

SCHEDULE A.

1.
The Estate or interest of the Insured covered by this Policy.

2.
Description of the Property, the title to which is insured.

3.
The deed or other means by which title is vested in the Insured.

SCHEDULE B.

SHOWING

Estates, defects, or objections to title, and liens, charges or incumbrances thereon which do or may now exist and against which the Company does not agree to insure, and also showing Special Risks insured against.

1.
2.
3.

CONDITIONS OF THIS POLICY.

1. Any untrue statement or suppression of any material fact, made by or with the knowledge of the Assured before the issuing of the Policy, shall avoid the Policy; but an assignee for value to whom the Policy has been transferred with the consent of the Company endorsed thereon, shall not be affected by any untrue statements or answers, or suppressions or breach of warranty contained in the application, of which such assignee was ignorant at the time the assent to the transfer was endorsed by the Company.

2. THE LAND TITLE AND TRUST COMPANY will, at their own cost, defend the Assured in all actions of ejectment or other proceedings founded upon a claim of title, lien, or incumbrance prior in date to this Policy, and not accepted therein. In case any person having an interest in this Policy shall receive notice or have knowledge of any such action or proceeding, it shall be the duty of such person at once to notify the Company thereof in writing, and secure them the right to defend the action. Unless the Company shall be so notified within fifteen days, the insurance shall be void as to such person.

3. Where the liability of the Company is solely to the holder of a Policy as collateral security, such liability shall in no case exceed the amount of the pecuniary interest of such holder in the property described. Nor shall such liability in any case exceed the actual value of the estate or interest insured.

4. Defects, liens and incumbrances created or suffered by the Assured, or for which the Assured was liable or responsible at the date of the Policy, are excepted from the insurance.

5. This Policy may be transferred as follows, viz:—

I. As collateral security to mortgagees, holders of ground-rents, or others interested only as creditors in the title insured.

II. If it shall have been issued solely upon a ground-rent, mortgage, or other incumbrance, to the Assignees of such ground-rent, mortgage or incumbrance.

III. If it shall have been issued to cover some special risk, the insurance against such risk may be transferred.

IV. In case of transfers of the Policy, defects and incumbrances arising after the date of the Policy, or created or suffered by the Assured, are not to be deemed covered by the contract, and no transfer will be valid until it shall have been approved by the Company, and such approval may be refused if not applied for within thirty days after the conveyance or assignment of the interest insured. The Company will be entitled to a fee of one dollar for each transfer approved.

6. All interest in this Policy (saving that for damages accrued) shall cease by the transfer of the Policy, or of the title insured, except where the transfer of the Policy is authorized by its conditions, and has been approved as provided in condition five. Partial transfers of title shall reduce the insurance in the proportion of the value of the estate transferred to that retained. Such transfers shall not affect the interest of a holder of this Policy as collateral security, with the consent of the Company endorsed.

7. All payments under this Policy shall reduce the amount insured *pro tanto;* and no payment can be demanded without producing the Policy for endorsement of such payment. If the Policy be lost, indemnity must be furnished to the satisfaction of the Company.

8. Whenever the Company shall have settled a claim under this Policy, they shall be entitled to all the rights and remedies which the Assured would have had against any other person or property had the Policy not been issued. The Assured undertakes to transfer to the Company such rights, or to permit them to use the name of the Assured, for the recovery thereof. If the payments do not cover the loss of the Assured, the Company shall be interested in such rights with the Assured in the proportion of the amount paid to the amount of the loss not thereby covered. The Assured warrants that such right of subrogation shall vest in the Company, unaffected by any act of the Assured.

9. If claim be made because of unmarketability or defect of title, or of liens or incumbrances not excepted in the Policy, the Company shall have the right to take the estate or interest insured at its then market value, irrespective of the alleged defect, lien, or incumbrance, and shall be entitled to a conveyance thereof, with proper allowance for all defects, liens, or incumbrances not insured against by the Policy. And no action shall be brought against the Company for any claim under this Policy until thirty days after notice in writing of such claim.

In the event of a disagreement as to the value, the same shall be fixed by a majority of three appraisers, one chosen by the Company, one by the Assured and the third by the two thus chosen; the valuation thus fixed shall be final and conclusive.

A Policy of Title Insurance necessarily relates solely to the title prior to its date, and is not extended by the approval of any transfer thereof. Assignees of the Insured can only protect themselves against intermediate claims and losses by obtaining a new Policy.

THIS POLICY IS TRANSFERRED AS FOLLOWS:

DATE.	ASSIGNOR.	ASSIGNEE.	WITNESS.	APPROVED.

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